THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, JULY 30, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

WE yield space in this issue for the charge of Judge Sawyer to the jury in the case of Lee v. Guardian Life Insurance Co. upon its *fifth* trial. The importance of the questions at issue, the celebrity of the case, and the high judicial tone of the learned judge in his interpretation of the law, make this case an exception to our rule of publishing only the opinions of the courts of last resort. We have omitted such portions of the charge as were devoted to a summary of the evidence in the cause. The syllabus is furnished by Hon. J. O. Pierce of the Memphis bar.

LIBEL—PRIVILEGE OF WITNESSES BEFORE MILITARY TRIBUNALS.—Our contributing editor, Judge Dillon, having been present in the House of Lords on the 28th of June, and listened to the argument and judgment in the case of Dawkins v. Lord Rokeby—a case which has excited considerable interest in England—has taken the pains to send us a copy of the report of the case published the next day in the London Times, from which we have prepared the report of it which we elsewhere give. A history of this interesting case is thus given in the London Law Journal for July 3d:

In the year 1869, Colonel Dawkins commenced a course of litigation by an action against Lord William Paulet for libel. The defendant pleaded that the libel was written by him in the course of his duty as major-general of the Brigade of Guards, to the adjutant-general of the army, for the information of the commander-in-chief. The plaintiff replied that the libel was written with actual malice, and without any reasonable or probable cause. To this replication the defendant demurred. Two judges of the Court of Queen's Bench held that the replication was bad, but the Lord Chief Justice held it to be good. Dawkins v. Paulet, 38 Law J. Rep. (N. S.) 53. Colonel Dawkins did not bring error on that judgment, but in 1872 commenced a fresh action against Lord Rokeby for libel. The case was tried before Mr. Justice Blackburn, when his lordship in effect ruled that the action would not lie, if the statements complained of were made by the defendant, being a military officer, in the course of a military enquiry in relation to the conduct of the plaintiff, he being also a military officer, and with reference to the subject of the enquiry, although the defendant had acted *mala fide*, and with actual malice, and without any reasonable and probable cause, and with a knowledge that the statement made by him was false. In fact, Lord Rokeby had been examined *viva voce* as a witness at a court-martial, and then handed in a paper containing in substance a repetition of his evidence, with some additions on the subject, and this paper was received by the court. To the ruling of Mr. Justice Blackburn, the plaintiff tendered a bill of exceptions. In the Court of Exchequer Chamber nine judges upheld the ruling. 42 Law J. Rep. (N. S) Q. B. 63. Colonel Dawkins appealed to the House of Lords, and judgment was delivered on Monday last, the House consisted of no less than six peers, who were assisted by the advice of six judges. Colonel Dawkins, therefore, can not complain that his case has not received due attention, as six law lords and nearly every judge of the common law courts has considered this point at issue. The Lord Chancellor, whose judgment was adopted by four peers, held that, "upon all principles and upon all considerations of conscience and of public policy, the same protection which is extended to a witness in a judicial proceeding, who is examined on oath, ought to be extended, and must be extended to a military man who is called before a military court of enquiry for the purpose of testifying upon a matter of discipline connected with the army." His lordship, in affirming the judgment of the Exchequer Chamber, was content thus to proclaim a doctrine of general application, and did not deem it necessary to review the authorities, that task having been elaborately executed by the Lord Chief Baron in the court below.

In our next issue we propose to notice the cases on this question at length. Our space this week does not permit us to do so.

Law and Equity.

On page 262–3 of "An Introduction to the History of the Law of Real Property,"* we find a translation of a case from the Year Book, 4 Edward IV, 8, 9, which furnishes a bold and striking illustration of the distinction which formerly prevailed between law and equity. The action was trespass *quare clausum fregit*, and the defence was that the defendant, being siezed in fee of the said lands, had enfeoffed the plaintiff in fee, *to the use of the defendant and upon confidence*, and then that the defendant, by sufferance of the plaintiff and at his will, occupied the land and cut the trees within the said land, and depastured the herbage, etc., which were the acts of trespass complained of. "Wherefore," said Catesby, for the defendant, "should not the defendant avail himself of this matter, when it follows by reason that the defendant enfeoffed the plaintiff to the use of the defendant, and so that the plaintiff is only in the land to the use of the defendant, and the defendant made the feoffment to the plaintiff in trust and confidence? But Moile, J., said, "This is a good defence *in chancery*, for the defendant there shall aver the intent and purpose upon such a feoffment; for in chancery a man shall have remedy according to conscience upon the intent of such a feoffment; but here by the cause of the common law in the Common Pleas or King's Bench it is otherwise, for the feoffee shall have the land; and the feoffor shall not justify contrary to his own feoffment, that the said feoffment was made in confidence or the contrary." Catesby then said: "The law of chancery is the common law of the land, and there the defendant shall have advantage of this matter and feoffment; wherefore, then, shall he not have it in the same manner here?" To which the judge replied: "That can not be so here in this court, as I have already said; for the common law of the land *is different from the law of chancery on this point.*" Here, then, we have a conspicuous illustration of the fact that the use of the court of chancery in England created *two kinds of law*, the one a system of law which searched the hearts and consciences of litigants and decided according to the justice of the case; the other a medley of cramped, unyielding and barbaric rules, which so often resulted in injustice, that the attainment of justice in the law courts came to be almost a matter of indifference. Instead of those rules being capable of modification so as do justice, they were in theory inelastic and unyielding, though in practice, when they worked such uniform injustice as to become unendurable, they were often repudiated. But, with a falsehood, equal to that of Titus Oates on the witness stand (though with a higher motive), the judges, while they repudiated them, denied that they did so. That they might *seem* to be preserving a bad law, while they in reality put it aside, they, with a cowardice which we can scarcely conceive of in our day and country, resorted to *lies*, that is to say to *fictions*, and the law is still burdened with many of these excresences.

The establishment of the Court of Chancery in England

---

* London: Macmillan & Co. 1875.

resulted, then, in the case above quoted, and in many other cases, in the establishment of *two opposite kinds of law* in the same country, the one administered in one kind of a court, and the other in another kind of a court. Instead of there being one "common law of the land," as Moile, J., in the above case erroneously intimated, there were two opposing and conflicting laws of the land, administered in two opposing and conflicting tribunals—the one, as in the above case, a rule of justice, the other, a rule of injustice; the one, as in the above case, such a law as would assist a man in violating a sacred trust, and in thereby depriving another man of his heritage; the other, such a law as would uphold and enforce that trust and preserve to the other man his heritage.

We can easily understand how there may be different laws in the same country, applicable to different tribes, or even to different persons—just as there are different customs in England applicable to different localities, and just as Scotch law differs from English law. We can easily understand, for instance, how the victorious Franks who overran Gaul under Clovis, should prescribe their own law to themselves, and at the same time permit the Roman law to the Romans, the Burgundian law to the Burgundians, and the Gothic law to the Goths, whom they had conquered. So we can understand the motives of convenience which, in Oriental countries, regulate the rights of foreigners residing therein according to the laws of their respective countries. Yet, notwithstanding the fact that the history of the Court of Chancery is so familiar to the diligent student of English law that he ceases to wonder at the fact that its establishment resulted in producing, for a time at least, two living and opposing systems of law in the same country, we doubt if modern civilization presents another such an anomaly.

The matter of wonder does not consist in the fact that such a court as the Court of Chancery should have sprung into existence, but in the fact that the establishment of the "law of chancery," as Moile, J., in the above case, called it, which was the law of justice, did not sooner succeed in repealing and suppressing the opposing law of the Common Pleas and the King's Bench, which was the law of injustice. And what is still more a matter of wonder, these opposing systems of law (we do not refer to procedure) still linger, to some extent in opposition to each other, in some of the United States. Thus, in Tennessee, we have the spectacle of a separate court of chancery, which spends a considerable portion of its time in enjoining the judgments,—that is to say, in interfering with the final process,—of the courts of law; while in Texas the two systems are completely blended; that is to say, "the law of chancery," which is the law of justice, has succeeded in that state in completely repealing and suppressing the opposing law of injustice, as administered in the English Common Law Courts—so far as that law was opposed to the principles of right. Another year will, we presume, witness a like mingling of the two systems of law and equity in England. Could an Alfred have arisen while the contest between the Court of Chancery and the courts of law was being waged in England, this result might have been achieved at once, and by a single act of legislation. But Alfreds among kings, like Mansfields among lawyers and Shakspeares among men of letters, arise only at distant periods; and the result is that our so-called "system" of law is a mere patch-work of temporary expedients. While generations of ordinary minds, combining into a general effort their crippled and hobbling devices, can not accomplish for mankind what a single Alfred might have done.

"———— Though all in one
Condensed their scattered rays, they would not form a sun"

My Reception as Advocate at the Parliament of Paris.*

The profession of the law was for a long time the object of my most earnest desire, and the constant object of my labors, and the only profession which appeared suited to my tastes and habits, and my cherished affection for independence.

I resolved, therefore, to apply myself exclusively to the study of the law in the office of my uncle *Soreau*, an eminent jurisconsult of Paris, a condesciple of some of the most celebrated lawyers of the period;—and the day soon arrived when I was to be sworn in as a member of the Paris bar.

This ceremony is imposing, and could only be performed at the meeting of the Parliament in solemn audience, presided over by the president and surrounded by about forty councillors in full gala, dressed in their red gowns trimmed with ermine.† The aspirant was not admitted inside the bar unless accompanied by some known patron, who guaranteed his fitness and morality.

My patron on this occasion was *Troncon Ducoudray*,‡ whose manly eloquence already equalled the noble qualities of his heart—an eloquence which was as great as it was fatal, since it caused its illustrious possessor to be exiled to Cayenne, where he died shortly after his arrival.

Before being admitted to the audience (*la grand chambre*) the applicant for admission was introduced by his patron to the attorney-general in order to obtain his *admittitur*. There he was frequently subjected to a severe examination, and he was required to answer questions as well in relation to the duties of his profession, as to the principles of honor that ought to guide him in his conduct when admitted to the bar. I ap-

*For the translation of this article, which is from the French of I. F. Bouilly, we are indebted to the pains and courtesy of Gustavus Schmidt, Esq., of the New Orleans bar, now in his eightieth year.

Bouilly, born in Tours about 1774, was early distinguished for his talents. Having for reasons already indicated been compelled to abandon the bar, he devoted himself to literature with great success, wrote several pieces for the theatre, of which a distinguished mæstro of of the time, *Gretry*, composed the music. Among the best of his productions "Abbe de L'Epee," which has been translated into every European language, deserves mention. He was well at court, frequented the saloons of Madame Necker and Mme. de Stael, and wrote numerous very moral and instructive works, well known to those acquainted with French literature. The preceding translation is taken from an autobiography written by himself, entitled "*Mes Recapitulations*," in which, like Gil Blas giving an account of his life and adventures to the Duke of Lerma, it is to be presumed that he suppressed certain events which were not to his advantage. In the introduction to his biography, he says: "I love liberty more than glory; I have never employed my talents to injure anybody; these are my titles; on these I found my nobility."

† For the privileges and costumes of the lawyers of the period, see *Dupin*, "Profession d'Avocat," vol. 1, where the subject is fully treated.

‡ *Troncon Ducoudray*, born in Reims, 18 Nov. 1750, died at Cayenne in 1798 was a distinguished lawyer of Paris, who took an active part in the French revolution, of which he attempted to direct the current in the interests of humanity and the public. He offered to defend Louis the XVI, which he was not permitted to do; but made an admirable speech in behalf of Marie Antoinette, which seems to have inspired the celebrated Edmund Burke in his brilliant effort, wherein he speaks of her in terms which for their eloquence and beauty have never been surpassed in any language.

peared, consequently, before *M. Seguier*§ a worthy descendant of that distinguished and ancient class of magistrates, long the honor of France. He had succeeded the illustrious Chancellor *d' Aguesseau*, whose talents and noble character he appeared to have inherited. His figure was commanding, his eyes, protected by heavy eyebrows, were piercing, and seemed to read your inmost thoughts, and his sonorous voice inspired a species of terror, which the affable and insinuating expressions which escaped with a charming facility from his lips, soon effaced.

Among the various questions he asked me, was "*Which was the leading virtue of the profession I intended to pursue?*" To which I replied, "*The love of independence.*"

Fixing me sternly, he said, "Do you belong to that class of young innovators who dream of great changes in the laws of our government?" "My lord," I replied, "it is not for me to add my feeble voice to that of the great reformers; but I have read with the greatest delight your admirable discourse (*requisitoire*) of the 18th August, 1770, where, although decorated with the purple and ermine of your station, you have explained the causes of an approaching revolution in the law." *M. Seguier* could not suppress a smile, and signing my *admittitur* he said, "You are the descendant of magistrates; take back your diploma; I doubt not you will be a worthy successor of your ancestors." "Who could more worthily serve me as an example than yourself," was my ready reply; when he again smiled, and, pressing my hands in his, returned my diploma, and invited me to follow him.

Ducoudray, and several young bachelors, who, like myself, were about to be admitted, followed the attorney-general, at whose request all of us were admitted to take the oath before President *Deligre*, who caused us to be seated within the bar.

It is impossible to express my joy and the dignity I felt as a man in taking a seat among the great orators, who at this time defended the interests of their clients before the Parliament of Paris, nearly all of whom were present. My dazzled and eager eyes examined the faces of those venerable men whose knowledge, courage and eloquence had so often defended the feeble against the powerful, innocence and honor against false accusations, unmasked hypocrisy, recovered usurped rights, consoled the afflicted, and maintained everywhere the sacred rights of justice. But among the different faces which attracted my attention there was one which, as by magic, arrested it almost exclusively. It expressed a mixture of frankness and noble confidence, of intelligence and good nature, with a natural and inherent grace. Never until then had I seen so expressive and attractive a physiognomy, or one which excited so strongly my admiration. This bald head, its broad and intellectual forehead, sparkling eyes, graceful yet unconstrained attitude, Roman nose, a mouth furnished with the most beautiful teeth, and ready to act as interpreter of "burning thoughts," enchanted me so much that *Troncon Ducoudray* preceived it, and said, with that generous pride which induces a man of great talent to do homage to talents greater than his own, "That is *Gerbier*, the intrepid defender of *Lionci* against the Jesuits. He unites in himself strength and persuasion, can, when he pleases, be pathetic or witty, energetic or gentle, and the grace of his delivery is accompanied by a dignity of manner which renders it irresistible. In short, he is the Cicero of our bar."

Deligre, *Seguier* and all the empurpled magistrates had disappeared. I saw no one but *Gerbier*. I studied his movements and watched his looks. "To see him signifies nothing," said my patron; "you will soon hear him, and then you will judge for yourself of the admirable powers he possesses."

Shortly afterwards, this French Cicero arose to plead the cause of a young lady repudiated by her father, who had married a second time, and transferred to the two children of that wife all his affections. The defender of the father, *Hardouin de la Reynerie*, was a striking contrast to his adversary. A celebrated lawyer, with strongly marked features, his voice was harsh and menacing, while his opponent by his gentleness attracted the attention to his young client, seated by his side. *Hardouin*, by the force of his lungs, and his herculean frame, seemed desirous to screen his client, whom he defended with great talent and energy, from observation, as well as to counteract the effects of the irresistible emotions produced by the speech of *Gerbier*. The latter, after having by vigorous and well-directed arguments refuted those of his adversary, in a transport of emotion which electrified the audience, directed the attention of the judges to his client, and requested them to compare her features with those of her father, expatiating at the same time on the relative duties of parents and children, with an unction which moved his auditors to such an extent as to make even *Hardouin* shed tears, possibly for the first time. Perceiving the impression made, *Gerbier* directs the attention of the court to the striking resemblance between the father and the daughter, and expatiates with a natural and all-convincing eloquence on the impossibility to mistake or discard the evidence with which God and nature had armed his cause.

Then addressing the judges, he exclaimed: "Magistrates, abandon your judgment-seats, orators of the bar, lay aside your eloquence; for here nature exerts her power with a force far superior to any you can wield." In uttering these words, the father who had with the utmost difficulty suppressed his feeling, clasps with emotion his child in his arms, and the cause ended.

Bouilly then continues to express in glowing terms his own emotions, and exclaims with Tacitus, "*Quæ fama et laus cujus vis artis cum oratorum gloria comparandum est?*" and narrates the ovation which *Gerbier* received from the bar after the trial was concluded, and his own expectations of success as a lawyer, all of which vanished on the suppression of the Parliament of Paris, in consequence of some just and bold remonstrances against the corruption and excessive taxes imposed on the people to support the enormous expenses of a licentious court—all of which we omit as matters of history.

§ *Seguier*, a highly distinguished family of France, which has furnished many illustrious members to its magistracy, and some of which, we believe, are still decorated with, and do honor to its judicial ermine.

AFTER hearing some further arguments in the case of the will of the late Lord St. Leonards, Sir J. Hannen intimated he had come to the conclusion that the Rev. M. Sugden, should be allowed 350*l.* a year pending suit, he giving security that he would repay that amount, providing it turned out he was entitled to no share in the residue of the estate. As to the keeping of Boyle Farm, his Lordship ordered that if Mr. Sugden chose to occupy the house, under condition of paying the rent which a valuator would fix, he could do so, giving security if required, that he would keep up the property in good condition.

Diversion of Stream—User—Burden of Proof.

GRIFFIN v. BARTLETT.*

Superior Court of Judicature of New Hampshire, March 11, 1875.

Hon. EDWARD LAMBERT CUSHING, Chief Justice.
" WILLIAM SPENCER LADD, } Associate Justices.
" ISAAC WILLIAM SMITH, }

1. **Diversion of Stream—User.**—The same proof of user, which establishes the right to use the water of a stream in a particular way, is equally conclusive in establishing the limitations of that right. The doctrine of Burnham v. Kempton, 44 N. H. 78, affirmed.

2. ——. ——. **Change in Use of the Water.**—B. having gained by prescription a right to flow G.'s meadow, from October to June of each year, to the height of his ancient dam, repaired and tightened the dam, erected an additional mill, put in new and improved machinery consuming less water, and claimed the right to operate the mills as thus constructed, provided he did not raise the water above the top of his ancient dam. *Held*, that he could not flow G.'s land in a different manner nor to a greater extent than he had formerly done.

3. ——. ——. **Burden of Proof.**—G., having brought an action against B. for flowing his meadow, showed no title to the land flowed, except a deed dated in 1831, and no possession prior to that time. B. showed that G.'s meadow had been flowed prior to 1831, by a dam, over which he (B.) had exercised control since 1868, and claimed that his right to flow G.'s meadow would be presumed, and that the burden of proof was on G. to show that he had acquired a right to hold his land free of water. *Held*, that the burden of proof was on B. to show that he had a right to flow as claimed by him.

Case, for flowing the plaintiff's meadow, situated on the shore of Jenness pond in Northwood. The declaration alleged that the defendant, ever since the first day of January, 1867, had maintained, kept up, and continued a mill-dam in said Northwood, across a brook forming the outlet of said pond, and by means thereof has raised and kept up the water in said pond, and thereby made it to overflow and drown the plaintiff's meadow, whereby the plaintiff's grass growing on said meadow was damaged, etc. Plea, the general issue. It appeared at the trial that the dam named in the declaration had existed since about the year 1828, and that a dam had existed near the site of the present dam beyond the memory of man, and that they were used originally to supply water to a certain ancient saw-mill which was owned by the father of the plaintiff in common with the father of the defendant and others, each owner having the right to use the mill one day in twenty-four for every share owned by him during the life of the mill,—the father of the defendant owning one share; and that for twenty-nine years last past the defendant has drawn water from the same dam to supply his shingle and clapboard mill, situated below the saw-mill, subject to the right of the owners of the old saw-mill, so long as it was in use, and since 1869 to supply a grist-mill also, having in 1868 and 1869 repaired and tightened the dam (and, as the plaintiff claimed, raised it), and from that time assumed control over it. It did not appear whether or not the defendant drew water from the dam to a shingle and grist-mill, during the time named in the declaration, differently from or in less quantity than before. One of the claims set up by the plaintiff was, that the ancient saw-mill was used almost entirely in the spring of the year; that it consumed large quantities of water; and that by its use the water was so drawn from the pond by the end of May that the lands of the plaintiff on the shore of the pond were left dry and free from water during the summer months and the months of September and October. It also appeared that the saw-mill was suffered by the owners thereof to be disused and to decay, and that the same had not been used since the year 1859 or thereabouts; and the plaintiff claimed and offered evidence to show that after that time the gates in said dam had been raised in the spring of the year, and the water drawn off so that the plaintiff's land continued to be left dry and free from water during the months above stated, down to about the time the defendant repaired the dam, when he refused to hoist the gate or allow it to be hoisted, since which time the water has remained upon the plaintiff's land during the summer months. The defendant claimed that the plaintiff, claiming title under his father, who owned one share in the mill, is estopped to complain of any damage arising from its disuse; but the court ruled otherwise, and the defendant excepted. The defendant also asked the court to instruct the jury that the mere neglect or refusal of the defendant to open the gate of said dam, under the above circumstances, does not entitle the plaintiff to maintain this action; but the court instructed the jury that the law would be as stated by the defendant if he did not maintain the dam; but the defendant having repaired the dam and assumed control over it, he is liable, unless he has a right to keep the water as he did keep it; to which the defendant excepted. The plaintiff showed no title to the land flowed except a deed dated in 1831, and no possession prior to that time. The defendant offered evidence to show that the dam had existed before 1831, and claimed that it was substantially of its present height, while the plaintiff claimed and offered evidence tending to show that its efficient height was increased by the defendant when he repaired it in 1868 and 1869. The evidence showed that the dam had been used prior to and since 1831 to raise the water upon the land claimed by the plaintiff, and that it had raised the water to the full height of the dam at certain seasons of the year; but the plaintiff offered evidence to show (and no evidence was offered to contradict it), that the land flowed was cleared up soon after 1831, had been mowed every year afterwards down to the year 1868, and cranberries had been picked every year down to the year 1868, and that it had not been flowed down to that time during the summer months and September and October, but that since 1868 the plaintiff had not been able to mow said meadow, nor pick any cranberries upon it, except a few in a boat in the fall of 1868; and the evidence tended to show that the cranberry vines had all been killed, and also the trees upon that part of the meadow claimed to be flowed, and that it had been covered with water substantially the whole season. The defendant claimed that having proved that the land had been flowed prior to 1831 by the dam, of which he had exercised control since 1868, the right of the defendant to continue the flowage is to be presumed, and that the burden is on the plaintiff to show that the defendant's right to flow the land had been lost or modified, or that the plaintiff has acquired a right to hold the land free of the water; but the court charged the jury that there is nothing in the fact that the title of the defendant is older than the title of the plaintiff, but the defendant must still make out his right to flow the land by proving twenty years' adverse use in the manner complained of; to which the defendant excepted. The defendant showed title to an undivided half of the land upon which the dam and saw-mill stood; but there was no evidence of any right in the defendant to flow the plaintiff's land, except such as had been gained by prescription. The defendant requested the court to instruct the jury (1) that the extent of the defendant's right to flow the shores of Jenness pond will be the height to which a dam of the same height as that which the dam he has sustained more that twenty years would flow, although some part of the time, by leaking and want of repair, the dam has not kept the water to its original height; and that the owner of such a dam may repair it and thereby keep the water up uniformly; [(2) and that if the jury find that the defendant, or the persons from whom he derives his title, did, more than twenty years before the date of the writ, build or maintain a dam calculated and intended to raise the water as high as the top of the same, and did from time to time repair and tighten said dam so that the same did so raise the water, the right to keep the water as high as the top of the dam is not lost by the dam becoming leaky and out of repair, but the owner might at his pleasure repair and tighten the dam;] (3) and that the existence thereof, with mills in actual use, and the frequent flowage of water to the height of the dam, was notice to the plaintiff of the claim and right of the de-

*For the report of this case, we are indebted to advance sheets of the 55th N. H. Reports, furnished by the courtesy of John M. Shirley, Esq., the official reporter.

fendant to maintain, repair, and tighten the dam, and that the right of the defendant was maintained, notwithstanding the dam from time to time became leaky and insufficient to keep up the water long at a time; (4) also, that a mill-owner may adopt improved machinery in his mill, which takes less water to carry it than that in use before, although the effect of this may be to keep a higher state of water in his pond; and that this defendant had the right to substitute other machinery, and that which would use less water or use it less rapidly, for the old saw mill, provided he did not raise the water above the top of his ancient dam; (5) also, that under the present declaration the plaintiff can not recover for damages caused, not simply by the maintenance of the defendant's dam, but by the improper use of it at certain seasons of the year, or by the omission to withdraw the water so rapidly or so early in the season as the defendant ought. The defendant excepted, because the court did not give these instructions, except the portion enclosed in brackets, and because the court added thereto the following: "that is to say, if he had once gained the right he would not lose it by letting the dam get leaky and out of repair for a period of less than twenty years." There was no evidence that the defendant had introduced any improved machinery into his mill, or made any change in his mill, except the addition of a grist-mill. The court instructed the jury, that if the defendant or those under whom he claimed had raised the water to the height of the dam a sufficient number of times, and kept it for a sufficient length of time, so that a reasonable man, owning land upon the shore of the pond, and knowing of the existence and capacity of the dam, ought to have understood, from his observation of the management of the water, that the defendant or those under whom he derived his title claimed the right to keep it at the same height at all seasons of the year whenever they had occasion to do so (during a period of twenty years before any controversy arose), then the defendent has gained such right and is not liable.

Verdict for the plaintiff. Motion to set it aside. The case was reserved.

Wiggin (with whom was *Marston*), for the plaintiff.

Hatch, for the defendant.

SMITH, J.—1. The defendant claimed that the plaintiff, claiming under his father who owned one share in the saw-mill, is estopped to complain of any damage arising from its disuse. I do not understand how any such question could arise in this suit. The plaintiff does not claim damage from the disuse of the saw-mill, but because, as he alleges, the defendant has flowed his land. The ruling was therefore correct. Whatever rights were acquired growing out of the operation of the old mill expired with the disuse and decay of the mill, or, as expressed in the deed used on the trial, were to be enjoyed "during the life of the mill." It does not appear that the plaintiff has used the dam since the saw-mill went into disuse in 1859, or has in any way interfered with it, except to raise the gate in the spring for the next ten years, to permit the water to be drawn off from his land during the summer months. Since 1868 or 1869, the dam has been under the exclusive control of the defendant, who has refused to allow the plaintiff to draw off the water in the summer months, as had been done previously, or to exercise any control over it. There is no ground, then, for claiming, as the defendant did in the argument, that for all damages in this suit growing out of the neglect to use the saw-mill the plaintiff and the defendant are jointly liable, if at all, and can not be sued separately, nor that the neglect of the plaintiff contributed to the injury as much as that of the defendant.

2. The defendant's refusal since 1869 to hoist the gate, or permit it to be done in the spring, caused the plaintiff's land to be flowed during the summer and fall months. Whatever right of flowage the defendant or those under whom he claimed had gained to flow the plaintiff's land in the winter and spring by prescription, neither he nor they had gained any such right from June to October. The defendant, having assumed control of the dam in 1869 and excluded the plaintiff from its use or possession, must be liable unless he had a right to keep the water as he did keep it, and the instruction of the court in this respect was correct.

3. The case finds that the defendant had no right to flow the plaintiff's land, except such as he gained by prescription. The burden of proof was, therefore, on him to show not only that he had gained a prescriptive right to flow the plaintiff's land, but that he had gained such right in the extent claimed by him. The mere fact that his title was older then the plaintiff's is of no consequence. The construction asked for was equivalent to saying that the defendant's prescriptive right was established by flowing the land before the plaintiff bought it, without reference to length of time or manner of flowage. When the right to flow is once proved to have been gained either by prescription or grant, undoubtedly the burden of proof is on the person whose land is flowed to show that the right has been lost or modified. The instructions of the court to the jury that the defendant must still make out his right to flow the land by proving twenty years' adverse use in the manner complained of, notwithstanding his title was older than the plaintiff's, were, therefore, correct.

4. As to the remaining instructions asked for by the defendant, the first has some support from the authorities in Massachusetts. Cowell v. Thayer, 5 Met. 253; Ray v. Fletcher, 12 Cush. 200; Jackson v. Harrington, 2 Allen, 242; Bliss v. Rice, 17 Pick. 23. The doctrine of the latter case was dissented from in Burnham v. Kempton, 44 N. H. 90, where it is said by Sargent, J., that "twenty years' maintenance of a dam in a particular mode is evidence of a grant or right so to maintain it, and twenty years' use of the water in a particular way is evidence of a right thus to use the water. The same proof of user which establishes the right, is equally conclusive in establishing the limitations of that right. Twenty years' accustomed flow and use of a certain stream or pond of water, is as good evidence of right to the one party as to the other. Twenty years' support, subject to the qualifications before stated, of a mill-dam, is evidence of a grant to build and maintain just such a dam, constructed and used substantially in the same manner;"—see, also, Bucklin v. Truell, 54 N. H. 122.

The doctrine of the other Massachusetts cases above cited was dissented from in Gilford v. Lake Co., 52 N. H. 266, the judge who delivered the opinion of the court very pertinently remarking, "Land-owners are not bound to make annual pilgrimages to measure the dam, and employ an engineer to calculate whether, if kept tight and full, it can be used to throw water on their land."

The second instruction asked for was given in substance. What the court added was the same doctrine expressed in different language. There is no question that a right to flow once gained is not lost by neglect to assert the right for a period less than twenty years; and this is the fair construction of the language of the instruction asked for, and of the explanation given by the court.

The third instruction asked for does not conform to the rule as laid down in Gilford v. Lake Co. The instructions given were in the language of the court in that case. The distinction is obvious. It was material for the defendant to prove that the right to flow to the height and in the manner claimed by him had been asserted, and the flowage kept up during a period of twenty years before any controversy arose, and also to show that the flowage, to the height and in the manner claimed, was so frequent and kept up for such length of time, that the plaintiff, knowing of the existence and capacity of the dam, ought reasonably to have understood from his observation the extent of the defendant's claim.

There was no evidence, relevant and pertinent, upon which to found the fourth instruction asked for. Goodrich v. Eastern R. R., 38 N. H. 390. It is claimed, however, by the defendant, that

the operation of a grist-mill since 1869, in addition to the clap-board and shingle-mill, made the request true in fact. The addition of another mill would increase the consumption of water. But the question was not whether he had merely raised the water above the top of his ancient dam. This right to flow the plaintiff's land as it had been flowed down to the time he assumed control of the dam was not questioned, but the plaintiff claimed it was limited and defined by the manner it had been flowed uniformly down to that time; and the question was, whether, with such machinery as was actually used, even though it was of such improved patterns that he was enabled to operate an additional mill with the same quantity of water, he flowed the plaintiff's land in a different manner or for a longer period in the year than he had previously done.

The last instruction asked for was also properly refused. The declaration alleges that the defendant has maintained the dam since January, 1867, and *thereby* made the water to overflow and drown the plaintiff's meadow, *whereby* the plaintiff's grass growing on said meadow was damaged, etc. The mere erection and maintenance of the dam furnished no ground to the plaintiff upon which to maintain an action at law against the defendant. The gist of the charge in the declaration, as well as of the action, is not the maintaining of the dam, but the flowage of the plaintiff's land; and the authorities leave no room for doubt that the declaration is sufficient for supporting this action. Curtice v. Thompson 19 N. H. 471; Sargent v. Stark, 12 N. H. 332; Gilford v. Lake Co., 52 N. H. 262; Carleton v. Reddington, 21 N. H. 291.

CUSHING, C. J.—The plaintiff claims damages against the defendant for maintaining a certain dam at the outlet of Jenness pond, from the first day of January, 1867, to the date of the writ, and thereby causing his land to be flowed so that he lost the use of it.

The damage shown was, that the plaintiff's land, which was cleared in 1831, and had been mowed and borne cranberries every year till 1869, had since that time been so flooded by the defendant's dam that it could not be mowed; that the cranberry vines had been destroyed, and the trees had died; and that this damage had been caused by the defendant's management of the dam, which he had fully controlled, and from the possession of which he had excluded the plaintiff.

This dam, and a former dam which this had replaced, had been used to supply water to an ancient saw-mill, under an agreement between the plaintiff's father, whose rights he had, and the party whose rights the defendant had, which agreement by its terms was to endure during the life of the mill, and I infer from the plaintiff's argument, that the plaintiff and the defendant were tenants in common of this dam.

Subject to the rights of the owners of this mill, the plaintiff, for twenty-nine years before the commencement of the action, had drawn water to supply his shingle and clap-board mill, but had not excluded the other tenants in common, and the evidence tended to show that by the use of the saw-mill until its "death," in 1859, and by opening the gates afterwards, the water had been so drawn down that in the summer months, and in September and October, the plaintiff's land had not been flowed, and had been in suitable condition for cultivation; but that after 1868, the defendant had assumed exclusive control of the dam, and so maintained the dam and managed the water as to do the injury complained of.

The plaintiff acquired his title in 1831; and the defendant offered evidence tending to show that he had flowed the land at some seasons of the year before the plaintiff acquired his title.

The plaintiff having made out his title to the land, and shown the damage done to him by the flowage, it was incumbent on the defendant to make out his right.

The defendant's first claim was, that the plaintiff being tenant in common with him of the dam, was as much to blame as he was for letting the saw-mill fall into disuse, and so for all that class of injuries he was estopped from complaining,—which the court very properly denied, because the plaintiff was not claiming damages for any such injury.

The defendant further asked for the instruction, that his neglect or refusal to open the dam would not make him liable, which the court admitted to be true so long as the defendant had not excluded his co-tenants, but denied to be true at the time covered by the plaintiff's action, when he had, as it appeared, assumed exclusive control.

In the case of Fifield v. Bailey, *post*, [55 N. H.] it was held that the disseizee could maintain an action on the case against the disseizor for a nuisance maintained by him on land of which he had wrongfully dispossessed the plaintiff. I fail to see that the case is in any respect different when the disseizor was a tenant in common with the disseizee.

It may be remarked here, that the defendant's claim, that he and the plaintiff were occupying the dam as tenants in common, and therefore equally responsible for the flowage, is necessarily fatal to the defendant's claim of any prescriptive right, it being against well settled that a party can not acquire a prescriptive right himself. See Wilder v. Clough, *post*. [55 N. H.] The defendant's ground is, that such user, as tenants in common, must be permissive on the part of the plaintiff, and not adverse.

The defendant also claimed, that having shown that he had flowed the land, the law would presume that his right to flow, continued until he was shown to have lost it. This would seem to have been a statement in a new form of the doctrine of Dunklee v. The Wilton Railroad, 24 N. H. 489, that property conveyed, passes subject to all existing easements, but that doctrine in that case is limited to rightfully existing easements, which the court rightly held must be the limitation here.

The other instructions claimed by the defendant, so far as disallowed by the court, were attempts not in conformity with the law to substitute some secondary measure of the extent of the prescriptive right, instead of the actual extent of the flowage.

Nothing can be more fallacious than the idea that the height of a dam can be the measure of the right to flow gained or lost. Suppose, for instance, a party maintains his dam at a certain height, and afterwards by improved reservoirs, or other means, the water is so increased as that instead of being dried up in the summer months, the pond should be kept full of water during the whole season; land which under the old mode of usage, would be drained in the summer months, would now become saturated with water during the same season, and the water grasses would take the place of the former more valuable products. The right acquired by prescription to keep the dam at a given height, under the former state of things, would hardly be extended to the latter.

LADD, J.—The case shows that the defendant within the time covered by the declaration, has maintained a dam, and thereby flowed the plaintiff's land. For the damage thus caused he is liable in this action, unless he shows a right so to do. I can not find anything in the case to sustain the position taken by the defendant's counsel in argument, that the plaintiff is seeking to recover for damage caused by a neglect to use the old mill. The declaration certainly shows nothing of the kind, and I am quite unable to perceive how the use, or disuse and decay of the old mill, bears upon any question we are to decide. The evidence as to how the water was used in connection with the old mill, as well as that with respect to the hoisting of the gate and drawing off the water in the summer seasons after 1859, bore upon the nature and extent of the right to flow, if any, which had been gained against the plaintiff by an adverse user, and was properly received for that purpose.

The injury of which the plaintiff complains is, not that his rights in the use of the water at the mill, or in the control and management of the dam have been infringed, but that the defend-

ant, who has in fact been in the occupation of the premises, and has had and exercised an actual control and management of the water, has without right so managed it as to flow and injure the plaintiff's land. The refusal of the defendant to hoist the gate, is nothing more than an incident in his management and control of the water. I do not see that it matters at all whether he kept the water up by refusing to hoist, or allow to be hoisted, a gate already existing in a dam at the outlet of the pond, or by erecting and keeping up a solid dam there, not furnished with any gate at all. I am therefore of opinion, that the defendant's position on this point can not be maintained.

After the plaintiff showed that the defendant had kept up the water, and caused it to flow his land, it was for the defendant to show his right to do so. Such right was not established by the fact that the dam had been used prior to 1831, when the plaintiff's title accrued in the way stated in the case, without showing an occupation and user sufficient to establish the right claimed by prescription. This was not done, and I think the ruling that there was nothing in the fact that the defendant's title is older than that of the plaintiff, etc., was correct.

I see no fault in the instructions to the jury, and all the requests that were proper to be given seem to be covered by the instruction that was given.

The fourth request, as to the putting in of improved machinery, and its effect on the condition as to the height of the water in the dam, was not called for by the evidence, as is shown by the case, and was properly refused.

As to the defendant's contention, that the height of the dam measures the extent, and determines the character of a water right gained by prescription, that matter was decided in Gilford v. The Lake Co., 52 N. H. 262, adversely to the defendant's view. The exceptions must be overruled, and there must be

JUDGMENT ON THE VERDICT.

Libel—Privilege of Witness before Military Courts.

DAWKINS v. LORD ROKEBY.

In the House of Lords, June 28, 1875.

Before Lord CAIRNS, C., and Lords SELBORNE, PENZANCE, O'HAGAN, CHELMSFORD and HATHERLY, assisted by six of the Common Law Judges.

A written communication, submitted by a military officer to a court of enquiry, with reference to the habits and conduct of an inferior officer, the same being the subject of the enquiry, will not afford ground of an action for a libel; and this is so, although the statements made in such communication may have been false, malicious, and made without probable cause, and with a knowledge that they were false.

This was an appeal from a decision of the Court of Exchequer Chamber, on a bill of exceptions tendered to the ruling of Mr. Justice Blackburn, in an action brought by Lieutenant-Colonel Dawkins, formerly of the Coldstream Guards, against Right Hon. Lord Rokeby, who at the time of the occurrences complained of held the position of Lieutenant-General in the army.

The learned counsel who appeared in the case, were *Mr. Matthews, Q. C.* and *Mr. Holt* for the appellant, Lieutenant-Colonel Dawkins; and *Mr. Bulwer, Q. C., M. Charles Bowen* and *Mr. Fitzmaurice*, for the respondent, Lord Rokeby.

The question involved by the appeal, is whether an action will lie against a military man, for statements made by him in the course of a military enquiry in relation to the conduct of the plaintiff, also a military man, and with reference to the subject of that enquiry, where the plaintiff shall have proved that the defendant has acted *mala fide* and with actual malice, and without any reasonable and probable cause, and with a knowledge that the statements so made by him are false. Mr. Justice Blackburn ruled that no such action would lie, and the Court of Exchequer Chamber supported his decision. The facts of the case were as follows: Lieutenant-Colonel Dawkins having been reported to have exhibited on several occasions a want of deference to some of his superior officers, and to have been guilty of other unofficer-like conduct, and also to have made certain charges against several of his brother-officers, his Royal Highness the commander-in-chief, directed that a court of enquiry should be assembled; and that these matters should be enquired into and reported upon. A court of enquiry was held, and Lord Rokeby was required to attend, and did accordingly attend as a witness before this court. In the course of his *viva voce* evidence before that court, Lord Rokeby used the following expressions with regard to Lieutenant-Colonel Dawkins:

"I have seen him in the presence of his superior officers, and on every occasion he showed in his manner a total want of deference to their opinions, not to use a stronger term. He is not, in my opinion, always responsible for his actions, and he is unfit to command others, because he can not command himself. I have never found one of the superior officers of Colonel Dawkins' regiment who did not state to me that during his whole service he had been constantly taking offence where none was meant; and that he was habitually disrespectful to his commanding officers. His manner on every occasion on which I saw him confirmed that opinion. My enquiries led me to conclude that Colonel Dawkins was of so captious a disposition that he was at times not responsible for his actions."

At the close of his examination, Lord Rokeby handed in to the court a written paper to the following effect:

"On every occasion that I have seen him in the presence of his commanding officers, his manner has betrayed a total want of deference, not to use a stronger term, and all reports had represented him as habitually insubordinate. I also certainly told him that unless he gained more self-command, and behaved with more respect to those under whose orders he served, I must consider him unfit for command, as I did for his present position. I am still of that opinion, and I can not think I am overstepping my duty in expressing it clearly to him. He (the then adjutant-general) then asked whether I wished the lieutenant-colonel to be tried for insubordination. I answered I had only placed him under arrest, because I could not permit an officer to treat me with marked disrespect in the presence of a great many junior officers, but that as I scarcely believed him to be responsible for his actions, I should prefer his being admonished and released. I told the former court that which I again repeat—namely, that after a long and earnest consideration of all that has passed, I reported to his Royal Highness my conviction that the lieutenant-colonel was unfit to command."

A report was made by the court to the commander-in-chief, whereupon Lieutenant-Colonel Dawkins applied to the military authorities for a court-martial on Lord Rokeby, which was refused. Lieutenant Colonel Dawkins then brought the present action, in which he charged, that the written paper handed in to the court by Lord Rokeby was a libel, and that his evidence amounted to a slander. The case came on for trial in February, 1871, before Mr. Justice Blackburn and a special jury. The above facts having been admitted at the trial, it was proposed on the part of the plaintiff, to prove that the defendant in giving in such paper, and in making such statements was acting *mala fide* and with actual malice; and that the statements were made without any reasonable and probable cause, and with a knowledge on the part of the defendant that they were false. On behalf of the defendant it was objected that, even if such evidence were given, still the action would not be maintainable. Mr. Justice Blackburn was of opinion that the evidence offered to be given by the plaintiff was immaterial and irrelevant; and that as a matter of law the action would not lie, if the verbal and written statements was made by the defendant, being a military man, in the course of a military enquiry in relation to the conduct of the plaintiff, being a military

man, and with reference to the subject of that enquiry, even though the plaintiff should prove that the defendant had acted *mala fide*, and with actual malice, and without any reasonable or probable cause, and with a knowledge that the statements so made and handed in by him were false, and directed the jury to find a verdict for the defendant. A bill of exceptions having been tendered to the ruling of the learned judge, the case was argued before the Court of Exchequer Chamber in February, 1872. 42 L. J, (Q. B.) 69. The Court of Exchequer Chamber were unanimously of opinion, that the ruling of the learned judge at the trial was right, on the groun that the authorities were clear, uniform and conclusive; that no action of libel or slander lies whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law; and that such evidence being part of the minutes of the proceedings of the court, which when reported and delivered to the commander-in-chief, are received and held by him on behalf of the sovereign, and as such ought not, except by her majesty's command and permission to be produced, are therefore wholly inadmissible in evidence. They further decided that the occasion on which the statement was made was privileged. The court, moreover, were of opinion that there was another and a higher ground on which the defendant was entitled to their judgment—namely, that the whole question involved in the cause, was a military question, to be determined by a military tribunal, and was not cognizable in a court of law.

Mr. Matthews, Q. C., on behalf of Lieutenant-Colonel Dawkins now argued the case at considerable length, and contended that the decision of the court below was wrong on several grounds. In the first place he maintained that the mere fact that the words having been uttered before a military court of enquiry did not take them out of the cognizance of a court of Common Law, in a case where they were uttered maliciously, and were untrue to the knowledge of the person using them. Where a military officer did an act merely under color of an exercise of his military duty, but which was in reality malicious, he would not be protected by his military privilege.

The LORD CHANCELLOR said that if the learned counsel's argument was right, an action would lie against any member of a court-martial for malicious conduct.

Mr. Matthews said his argument did not go to that length, because the privilege of a judge even of a court-martial was absolute.

The LORD CHANCELLOR.—So that the person whose conduct may be in question before such a court, would not be able to proceed against any of its members, but may take his revenge against some other person, such as a witness.

Mr. Matthews thought that "revenge" was rather a harsh term to apply to the conduct of a man who was merely seeking legal redress for what he conceived to be a legal injury.

LORD SELBORNE.—Do you say that malice takes away all privilege? Because, if so, no proceedings whatever could be taken in which malice might not be alleged, in order to bring them before a court of common law.

Mr. Matthews apprehended that the authorities went that length. The learned counsel then proceeded to deal with the various cases cited in the court below, which he maintained did not govern the present case, and quoted several decisions from the time of Elizabeth to show that the common law courts would take cog nizance of military matters when there was either excess of jurisdiction or malice shown. Even if the words spoken were privileged as being uttered in the discharge of his duty, Lord Rokeby must be held liable for the written paper he had handed in as a mere volunteer.

LORD O'HAGAN.—That merely contained the substance of his verbal evidence.

Mr. Matthews further contended that Lord Rokeby, in giving evidence not upon oath before a tribunal of this character, was not entitled to the privilege of a witness, and that even if he were, the privilege of a witness was not absolute, and might be lost where his evidence was malicious and untrue to his knowledge.

The LORD CHANCELLOR.—You ore opening a vista of actions at law, I am afraid.

Mr. Matthews said that such actions were maintainable in every other country in Europe.

LORD PENZANCE.—If that were the case here we should have such actions brought every day.

Mr. Matthews said that the observation would equally apply to indictments for perjury.

LORD PENZANCE.—But they do not end in damages.

Mr. Matthews said that the action formerly lay for perjury in this country, but was now obsolete.

The LORD CHANCELLOR.—Is there any such case within the last 100 years to which you can refer us?

Mr. Matthews was not aware of such a case. On the whole, he submitted that the decision of the court below was wrong, and ought to be reversed.

Mr. Holt, on the same side, had nothing to add.

On *Mr. Bulwer, Q. C.*, rising to address the house,

The LORD CHANCELLOR said that it was not necessary that he should argue the case. Their Lordships had agreed to put the following question to the learned Judges who were in attendance:—"Whether the opinion and the ruling of the learned Judge, as stated in the bill of exceptions, were right in point of law."

The learned judges having retired for a short time, delivered their opinion in reply to the question put to them by their Lordships to the following effect:—We answer your Lordships' question in the affirmative. A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a court of justice. This does not proceed on the ground that the occasion rebuts the *prima facie* presumption that words disparaging to another are maliciously spoken or written. If this were all, evidence of express malice would remove this ground. But the principle, we apprehend, is, that public policy requires that witnesses should give their testimony free from any fear of being harrassed by an action on an allegation, whether true or false, that they acted from malice. The authorities, as regards witnesses in the ordinary courts of justice, are numerous and uniform. In the present case it appears in the bill of exceptions that the words and writings complained of were published by the defendant, a military man, bound to appear and give testimony before a court of enquiry. All he said and wrote had reference to that enquiry, and we can see no reason why public policy should not equally prevent an action being brought against such a witness as against one giving evidence in an ordinary court of justice.

Their Lordships then proceeded to deliver judgment in favor or Lord Rokeby, as follows:—

The LORD CHANCELLOR.—I am sure your lorships all feel greatly indebted to the learned judges for the attention which they have paid to this case, and for the very clear and satisfactory opinion which they have given in answer to your lordships' question. It is of importance that the house should bear in mind the precise expressions of the learned judge who tried the cause, because I feel sure that your lordships would not desire your decision to go further than the circumstances of this particular case would warrant. The leading facts which are put in prominence by the learned judge are these, that the statements were made by the defendant, who was a military man, and that the enquiry was a military enquiry; that the statements were made in relation to the conduct of the plaintiff as a military man, and were made with reference to the subject of that enquiry. I say this the more particularly because an argument was addressed to your lordships to show that the enquiry in question was not to be considered in the light of a judicial enquiry, and that the evidence was not evidence

given by a witness on oath. That is quite true, but it is at the same time stated in the bill of exceptions that it was an enquiry connected with the discipline of the army, that it was an enquiry warranted by the queen's regulations and orders for the army, that it was called by the field-marshal the commander-in-chief in pursuance of these regulations, and that the defendant in the action was called before the court of enquiry as a witness, as a person who was required to make statements relevant to the enquiry which was then being conducted, and that it was in the course of that enquiry that those statements were made. Adopting the expressions of the learned judges with regard to what I take to be the settled law as to witnesses and as to the protection of witnesses in judicial proceedings, I certainly am of opinion that upon all principles, and certainly upon all consideration of conscience and of public policy, the same protection which is extended to a witness in a judicial proceeding, who has been examined on oath, ought to be extended, and must be extended, to a military man who is called before a court of enquiry of this kind, for the purpose of testifying there upon a matter of military discipline connected with the army. It is not denied that the statements which he made, both those which were made *viva voce*, and those which were made in writing, were relative to that enquiry. Under these circumstances, I submit that the conclusion of the learned judges is in all respects one which we ought to adopt, and that your lordships will hold that statements made under these particular circumstances, are statements which can not become the foundation of an action at law. I, therefore, beg to move that the appeal be dismissed, with costs.

Lord CHELMSFORD, Lord HATHERLEY, Lord O'HAGAN and Lord SELBORNE merely expressed their concurrence in the judgment which had been delivered by the Lord Chancellor.

Lord PENZANCE based his judgment in favor of Lord Rokeby on the ground of public policy, which required that all witnesses should feel themselves at liberty to give their evidence without fear of their being dragged into litigation for something which they might rightly or wrongly have stated.

Judgment affirmed, and appeal dismissed, with costs.

Marine Insurance — Re-insurance — Description of Interest.

MACKINZIE v. WHITWORTH.*

English Court of Exchequer, February 10, 1875.

1. **Re-insurance—Recitals in Policy.**—It is not necessary, as a matter of law, to state at the time of effecting a policy of re-insurance, that it is a policy of that nature.

2. ——, ——. The plaintiff effected a policy of insurance "on goods," without mentioning that it was a re-insurance. The jury found that there was no concealment of any material fact, and the verdict was entered for the plaintiff. *Held*, on a rule to set aside the verdict, on the ground that the plaintiff was only interested as a re-insurer, and that he was not entitled to recover on the policy, that the plaintiff could recover.

This was an action on an ordinary policy of marine insurance on goods. Evidence was given at the trial, before Pollock, B., to show that it was usual, when effecting a policy of re-insurance, to state the fact, and this was admitted by the plaintiff. The plaintiff had not mentioned the fact that it was a re-insurance, and contended that it was not material; the defendant contended that it was a material fact, and that it had been concealed. The jury found that the fact that it was a re-insurance was not material, and the verdict was entered for the plaintiff.

Herschell, Q. C., obtained a rule to set aside this verdict on the ground that the plaintiff was only interested as a re-insurer, and that he was not entitled to recover on the policy.

Feb. 9.—*Benjamin, Q. C* (*Myburgh* with him), showed cause.—The simple question of law in this case is whether or no must a re-insurer declare, at the time of making the re-insurance, that it is a policy of re insurance. The jury have found that the fact was not material; there is, therefore, no question of concealment as a matter of evidence; it is purely a question of law. It is admitted that the plaintiff did not mention the fact; it is admitted that it has been usual to state the fact; but since recent legislation it is contended that it is not necessary as a matter of law to mention it. The course of legislation has removed the restrictions formerly imposed on re-assurance. By 19 Geo. 2, c. 37, s. 4, it was provided, "That it shall not be lawful to make re-assurance, unless the assurer shall be insolvent, become a bankrupt, or die; in either of which cases such assurer, his executors, administrators, or assigns, may make re-assurance to the amount of the sum before by him assured, provided it be expressed in the policy to be a re-assurance." By 27 & 28 Vict. c, 56, s. 1, re-assurances were allowed in every case, but the clause requiring the fact to be mentioned remained in force. By 30 & 31 Vict. c. 59 (the General Statute Law Revision Act) the whole of section 4 of 19 Geo. 2, c. 37, is repealed, so that the extended powers of 27 & 28 Vict. c. 56, remain, and the proviso requiring the fact of re-insurance to be stated is repealed. While this proviso remained in force the fact was always stated, and what is called a custom was really obedience to the law. The defendant will rely on Glover v. Black, 3 Burr. 1394, but at p, 1401 Lord Mansfield especially limits the decision to the facts of that case. [BRAMWELL, B.—There is, I suppose, a plea of not interested. Suppose I guarantee the payment of the price of goods to the vendor, have I an insurable interest?] Without doubt. The plea is that the plaintiff was not interested as alleged. The jury found that there were no facts in the case which rendered it material to state the fact that it was a re-insurance, and unless it would amount to material concealment, it is clearly not necessary to state the interest. Arnold on Insurance (ed. 1872), p. 46, lays down the law correctly, and in Phillips on Insurance, par. 424, it is stated "the interest of carriers may be insured under the description of the goods, without specifying the particular interest to be covered." At par. 498 the same writer says, "I conclude the better doctrine to be that an assured may effect re-insurance directly on the insured subject, without any disclosure in the policy or otherwise that it is a re-insurance." Reed v. Cole, 3 Burr. 1512 is in point. [BRAMWELL, B.—The suggestion there is that the plaintiff had no interest at all. In this case the defendant says in effect that the plaintiff is interested neither in the goods nor in their arrival, that he is only interested because he has insured them, and that he ought, in so many words, to have re-insured his own original insurance.] Yes, that is the argument, but it is submitted that it is concluded by the authority both of cases and text books: Crowley v. Cohen, 3 B. & Ad. 478, decides the very point. Chief Justice Tenterden there says, "The nature of the interest may in general be left at large." [AMPHLETT, B.—That again is a question of interest, not of re insurance, as it was then illegal.] That point was not taken, and being an insurance by a carrier it amounted in fact to a re-insurance. The underwriter looks to the goods and not to the motive of the insured. Anderson v. Morice, 23 W. R. 180, L. R. 10 C. P. 58, shows that very little is required to give an insurable interest, and to enable the plaintiff to recover.

Feb. 10.—*Herschell*, Q. C. (*Baylis* with him), in support.—There are two grounds on which it is submitted this rule should be made absolute, first, that the subject-matter of the policy was not properly described; and secondly, that the intention of the parties when they entered into the contract has not been carried out. In point of fact the interest was never described, the words "on goods" in the policy do not mean that it is a contract of indemnity. [BRAMWELL, B.—Surely they do, unless their meaning is limited by special words.] By the common usage of mercantile men, re-insurances have always been treated as a matter of business quite distinct from first insurance; some underwriters decline them altogether. The intention of the parties must be considered, and

*Our report of this case is taken from the Weekly Reporter, Vol. 23, p. 323.

this contract must be construed accordingly; the practical difficulties are great and must be regarded; third parties are introduced and have to be dealt with and the risk is increased. [BRAMWELL, B.—An underwriter can easily insert the words "warranted not a re-insurance."] The finding of the jury really was that as the ship had not sailed the fact was immaterial; it may not be material to the risk, but it is to the knowledge of the underwriter. He may wish to know the character of the person insured, and he would be misled by the common practice both here and abroad. The authorities are not opposed to this view. Arnould lays down that the ship, goods, freight, and profits must be described; it surely follows that the fact that it is a re-insurance should be mentioned. Phillips' par. 498, concludes "the better doctrine to be" that the fact of re-insurance need not be described; but his conclusion is not warranted by the cases he cites, and in that very section he writes, "Mr. Christian says a re-assurance must be expressly mentioned." Andree v. Fletcher, 2 T. R. 161; New York Bowery Fire Insurance Company v. New York Fire Insurance Company, 17 Wend. 359. [BRAMWELL, B.—Suppose a carrier insures goods which are destroyed by the Queen's enemies, so as to render him free from all liability, could he recover the value of the goods?] Doubtless if he had in fact insured them he might, he need not set up the defence of Queen's enemies, he might claim the money and pay it over to the owner; moreover, carriers and bailees have a special property in and possession of the goods, so that they can bring trover. London & Northwestern Railway Company v. Glyn, 28 L. J. Q. B. 188. Anderson v. Morice, 23 W. R. 160, L. R. 10 C. P. 58, merely decides that the plaintiff had an insurable interest. [POLLOCK, B.—The plaintifl's point is that if the underwriter has the insurance matter fairly described, it does not matter to him to know who the owner is.] Glover v. Black, 3 Burr. 1394, is a clear decision on the point as far as concerns *respondentia* and bottomry. A re-insurance is an indemnity on an indemnity; it may even extend to the premiums paid. The clear distinction between insurance and re-insurance has always been recognized, and 30 Vic. c. 23, sched. 3 and 4, especially mentions re-insurances, and provides for the stamp duty on them as though they would not otherwise come within the act which had already mentioned insurance.

BRAMWELL, B.—I am of opinion that this rule must be discharged; and that our judgment must be for the plaintiff. It is admitted on all hands that, as a general rule, a policy of marine insurance must contain a description of the ship, the subject-matter of the insurance, the voyage, and the perils insured against. A policy of insurance is a document to which a customary meaning attaches by mercantile usage. It imports that the person insuring states the subject-matter, the risk and the perils, and then, in effect, tells the underwriter that what he wishes is a guarantee against loss by the non-arrival of certain named goods. The defendant who seeks to avoid this policy, must make out clearly why an exception should be introduced in his favor; and in the present case, he attempts to do this for a reason which, if good at all, goes to the question of concealment. Now, if that is a good reason, then the jury were wrong; but there is no rule on the ground that the verdict was against the weight of evidence. The underwriter can put in any clauses that seem to him good or necessary measures of precaution, and in the present case the simple phrase "warranted not a re-insurance," would have held him harmless. He, however, maintains that the plaintiff was bound to add "being a re-insurance," after the words "on goods." If, however, this is immaterial, it would be an anomaly, and we are not to introduce anomalies into the law of insurance. The authorities, as it seems to me, are strong in the plaintiff's favor. A carrier is able to insure the goods he is carrying, just as though he were the owner, but if he could only insure his possessory interest—the interest, that is, which he has in their carriage—he would only recover a nominal amount in the case of their loss, something little, if at all, over his interest in the sum charged for carrying them; but the fact is that he really recovers a substantial amount. In the case of ships, the mortgagor and mortgagee can both insure their respective interests, and yet they are not both owners. The general rule is well known, it is laid down in Arnould and Phillips, and it clearly does not especially require the interest to be declared. The authority of Glover v. Black, 3 Burr. 1394, has been relied on by the defendant. The general principle of that case is not quite clear, but the peculiar circumstances are quite sufficient to justify the decision. Lord Mansfield decides in express terms that it is not to be considered that any general rule is there laid down, and on the particular facts of that case, which was on *respondentia* and bottomry bonds, he gives a judgment which was certainly convenient and in accordance with what appeared to be the general mercantile understanding of the day, and one which was warranted by the statement of the facts in that case. The present case is not one on a *respondentia* bond, and in my opinion, the rule should be discharged.

POLLOCK, B.—I am of the same opinion. The question before the court is, whether by law a re-insurer is bound to inform the underwriter that it is a re-insurance. There is no question of concealment here; that and all kindred questions are concluded by the finding of the jury. The *bona fides* of the plaintiff was established; the immateriality of the fact of the policy being a policy of re-insurance is found, and we have to decide what the law is. The contention is that the plaintiff is bound to show that the policy is one of re-insurance, and that if he does not he can not recover anything under the policy. There is no doubt that the assured is bound to state the subject-matter of the insurance, and the question is whether he can be considered to have done so when he has not mentioned his interest. I think that the fact that he did not declare his interest, does not deprive him of the fruits of his policy.

The case of insurances effected by carriers has already been referred to, and on the same principle the mortgagor and the mortgagee of a ship and a vendor and vendee can all insure their interest in the subject-matter of the contract. Reed v. Cole, 3 Burr. 1512, is in the same volume as Glover v. Black, and helps to show that the decision in this last-mentioned case turned on the particular facts, and that it was by no means intended to decide that in all cases (the statute requiring it having been repealed) the nature of the interest must be declared. In the case of Reed v. Cole the insured was a stranger to the ship, having parted with his interest, as was alleged in the plea, before the loss happened, and the court there held that he was still interested *quoad* the loss.

In the case now before us, the subject-matter of the policy is set out, and that is quite sufficient to entitle the plaintiff to recover. Before Glover v. Black was decided it is well known that there was great jealousy on the subject of lending and borrowing on ships and cargoes, as merchants, so called, were then not seldom mere adventurers. Wager policies and gambling insurances were of frequent occurrence until discouraged and forbidden by the law. In the case of Gregory v. Christie, 3 Doug. 419, cited in Park on Marine Insurance, vol. 1, p. 522, it has been held that the phrase "goods, specie, and effects" covered a sum of money advanced by a master for the benefit of the ship, and for which he charged a *respondentia* interest. In the Code de Commerce, art, 342, we find the provisions of the French law on this subject. Emerigon, chap. 8, s. 14, treats of the same subject, but it does not appear that there is much authority in the English books on the point now before us. I do not think that the defendant has established his case, and the rule must be discharged.

AMPHLETT, B.—After some doubt I have come to the same conclusion. My mind has wavered during the argument, and there appeared to me to be some difficulty in the question of the description of the subject-matter. If the first policy had been void for fraud, the second policy would have been void also, so

that there is some connection between the two. The custom which, it was admitted, prevailed amongst mercantile men, of mentioning the fact of a re-insurance, affects the case only as a matter of evidence, as to whether there was concealment or not. The argument as to the convenience of mentioning the second insurance seems to me to be very strong; the practice seems to be usual in the civilized world, although it may be observed that the authorities in America are divided on the point; but as the law stands in England, these would appear to be topics for a jury on the facts of each case. I am therefore of opinion, although not without some doubt, that the rule should be discharged.

RULE DISCHARGED.

Attorneys for the plaintiff, *Norris, Allen, & Co.*
Attorneys for the defendant, *Gregory, Rowcliffes, & Co.*

NOTE.—The English court is to be commended for its refusal "to introduce anomalies into the law of insurance." Conceding that the fact of the policy being a re-insurance was immaterial, as the jury found it, the conclusion seems irresistible that it need not have been mentioned. The question which this case thus settles for the English practitioner, does not seem to have been the subject of adjudication in America. It is true the English baron suggests that "the authorities in America are divided on the point." But an examination of the American cases and text-books, exhibits a curious misunderstanding on this subject.

Mr. Phillips, in the earlier edition of his work on insurance, quotes Christian's note to 2 Bl. Com. 460, "a re-assurance must be expressly mentioned to be a re-assurance, in the policy," and says (p. 204), "but the case cited by him (Andree v. Fletcher, 2 Term R. 161), does not appear fully to support the position." He then adds, "The opposite doctrine has been adopted in New York, where it has been held that an underwriter may effect re-insurance directly on the property insured by him against the risks he has assumed, without specifying that it is a re-insurance, but describing the property as in an original insurance," and cites N. Y. Bowery F. Ins Co. v. N. Y. F. Ins. Co., 17 Wend. 359. In this conclusion, the counsel in the principal case says Mr. Phillips was not warranted by the case he cited. In fact the case in 17 Wend. is not an authority on this point. The question was not discussed in it, and it seems to have been there a contract expressly for re-insurance, and so understood by both contracting parties. The rule laid down by Mr. Phillips in his later editions, par. 498, and quoted in the brief of counsel, *supra*, though now justified by the foregoing opinion, does not seem to have been drawn from any American authority. The other cases quoted in support of it decided merely that, in general, indirect interests in the insured property need not be specifically stated.

The later text writers on insurance seem not to have fallen into the same error that Mr. Phillips has as to the effect of the 17 Wend. case.

It has been generally held in America that the statute of 19 Geo. 2, was not in force, and that re-insurances were lawful, as well in fire as in marine cases. Merry v. Prince, 2 Mass. 176; Hone v. Mut. Safety Ins. Co., 1 Sandf. 137; Hastie v. DePeyster, 3 Caines, 190; Bowery Ins. Co. v. N. Y. Ins. Co., 17 Wend. 359. In a late case in the Court of Appeals of Maryland, at April term, 1874, it was decided that the statute of 19 Geo. 2, is in force in that state, but applies only to marine re-insurance, and that re-insurances of fire risks are, and have always been valid. Real Estate, Etc., Co. v. Caslow, 3 Ins. Law Jour. 757. It results that that statute remains in partial force in America, after its repeal in Great Britain. P.

Life Insurance — Fraud — Estoppel — Powers of Agents.

HANNAH LEE v. GUARDIAN LIFE INSURANCE COMPANY.

United States Circuit Court, District of California, March, 1875.

Before Hon. LORENZO SAWYER, Circuit J., and a Jury.

1. **Life Insurance—Application—Representations.**—The representations of the application enter into and form a part of the policy, when it is so conditioned; and if they are substantially false in any particular material to the risk, the policy is void.

2. ——. ——. ——. If the applicant knows, or has an opportunity to know, the statements made in the application signed by him, he is bound by those statements.

3. **Life Insurance — Agent — Powers of.**— A mere solicitor for life insurance, whose blanks and forms exhibit the limitations upon his authority, can not bind his principal by acts done in excess of such limitations, in a transaction of which those blanks and forms are a part.

4. ——. ——. ——. **Waiver—Estoppel.**—The act of such an agent in excess of his authority, does not operate against the insurer as a waiver or estoppel, when such excess was known to the insured or might have been known but for his own negligence.

5. ——. ——. **Fraud.**—If the applicant for insurance, either knowingly or through gross negligence, becomes a party to a fraud on the insurer, attempted or perpetrated by its agent, the contract thereby effected will be avoided for the fraud of such applicant.

6. ——. ——. ——. It is the duty of an insurer of lives, to itself, to other policy-holders, and to the public, to resist a claim made on an uninsurable life which it has been fraudulently led to insure.

SAWYER, C. J., charged the jury orally as follows:*

Before going into the merits of the case, I wish to give you this caution, gentlemen of the jury: I do not suppose it necessary, but still I deem it advisable, under the circumstances, to give it. You will sit here as an impartial jury, as impartial arbiters between these parties. You are neither to look with favor or disfavor upon the one or the other. You are to hold the scales of justice even. You are to determine the facts of the case upon the evidence that is before you, and not upon any other evidence or any other consideration whatever. You are to take that evidence as the witnesses delivered it to you upon the stand, precisely in the way that you believe them to intend to be understood.

Counsel, in their zeal, often differ as to what the testimony of witnesses is. In their interested view they are sometimes liable to misapprehend; they are apt to repeat testimony and give it a different turn, a different construction from that which was intended; or to echo it back in their own language and convey a certain idea of their own, when the witness does not mean to convey that precise idea.

Anything of that kind you are to disregard. You will reject all those changes and turns and glosses that may be given to the testimony conveying a meaning manifestly not intended by the witness, and take the testimony from the witness' own mouth, as you believe he desired it to be understood.

There is one other remark that, in view of the course which was taken in the argument, I think I ought to make:

A great deal has been said of the injustice of insurance companies defending against their policies. Now, gentlemen, I state this to you: That if a fraud has actually been perpetrated upon this defendant, and an uninsurable life has been fraudulently palmed off upon it, and its officers are aware of that fact, it is as much the duty of defendant to itself, to the other policy-holders in that company and to the public, to defend a suit upon such a policy, as it is to pay a loss when the policy has been fairly and properly issued.

You must determine all these questions upon their individual merits, and not allow youself to be swayed or prejudiced by what other companies have done, or by what this company may be said to have done in other cases on other occasions; you are to determine whether or not, in this particular case, there has been such a fraud perpetrated, or there are such other circumstances as give the defendant a just defence. If you find for defendant, then it is your duty to give it the benefit of that finding; if you find against the defendant, then it is equally your duty to give the benefit of the facts to the other party. You should not allow yourselves to be swayed either the one way or the other, but determine this case upon the evidence, upon its own merits, independent of any other action or other considerations.

* * * * * * * * *

A good deal has been said about the case of Wilkinson. In my judgment there are elements in this case which are important and material, and which are not found in that case. I shall not point out to you, gentlemen, wherein, because it is not your province to determine the law, but you will take the law as the court

*From report made by A. J. Marsh.

gives it to you, whether it be right or wrong, and be governed by it.

* * * * * * * * *

The first enquiry is: What relation has this application to the policy introduced in evidence? That is an important question for consideration. Was it a mere representation made by the party, as an inducement to insure, or does it go further, and does it form an integral part of the contract? Is it one of the elements or stipulations of the contract itself and a warranty?

The authorities are uniform, I think, on that subject, and upon the authorities this application is not a mere preliminary representation, but it enters into and forms a part of the contract itself. It is, therefore, a warranty and as much an element—a term of the contract—as any provision in it, as any other term of this contract.

The introduction of the contract is as follows: "In consideration of the representations made to them in the application made for the same, which is hereby made a part of this policy," and further along it proceeds, "and it is also understood and agreed by the within assured to be the true intent and meaning hereof that if the representations made in the application for this policy, and upon the faith of which this policy is issued, shall be found in any respect untrue, then and in such case this policy shall be null and void."

Now that makes the truth of the representation in the application, and the application itself an express stipulation, an express term of the contract. It is as much a part of the contract as though it were embodied in the policy itself. The fact that there are two instruments does not change the legal relation of the papers. Many contracts are composed of two or three, or four, different instruments, and although the application is in one instrument and the policy, so called, in another, they are one entire and indivisible contract, and the affirmance of the truth of the answers is as much a term of the contract as any other. If the answers are false—if they are substantially false in any matter material to the risk—then, by the terms of this policy, the contract is void and the defendant is entitled to a verdict, unless the defendant itself has done something—performed some act—by which it is estopped from availing itself of its provisions.

The provision is one of the terms of the contract. The defendant has never agreed in this policy to insure the applicant upon any other terms than that those representations are true, and the plaintiff has accepted the contract with that term in it. Their minds have fully met upon that one item of the agreement, and not upon any other proposition or terms. As I said before, if any of those representations are substantially false in any particular material to the risk, then, under the terms of this contract, the defendant is entitled to a verdict. That would be its right upon the contract itself. There is only one way, as before remarked, of avoiding this result; that is by correctly answering in the affirmative the question, Has the company done anything by which it has estopped itself from availing itself of this provision of the policy?

There is only one point upon which it is claimed the defendant has estopped itself. It is not claimed that the defendant itself, or its officers, have done anything to work an estoppel, because they have not been brought in contact either with the plaintiff or the assured.

It is claimed, however, that the act of Mr. Wright (in respect to which there is a conflict in the evidence as to what took place) is the act of the defendant; and that the parties are estopped by reason of his action in this, it is claimed, and the testimony on one side, the testimony of Mrs. Lee, is that these questions propounded in the application, were never read over to the applicant by Mr. Wright, and were never answered at all by Mr. Lee, the assured.

On the part of Mr. Wright, the testimony is directly to the contrary. His testimony is that he read these questions through, question by question, received to each Lee's answer, wrote it down as given, and after writing it down read the question and answer again before proceeding; and that he thus went through with each and every question in the application to Mr. Lee, who gave the answers now appearing in that paper.

Now, Mrs. Lee testifies that Mr. Wright did not read these over; and that the application was not filled up in the house; that when Mr. Lee was about to look at it, Mr. Wright put his hand over it and said: "You don't want to see that" or something to that effect; "You are to sign here; this is only a matter of form, and your signing it is only a matter of form to indicate that you desire to be insured."

Now gentlemen, this is claimed to be a waiver or estoppel against the defendant from asserting or relying upon the clause in question in the contract.

I instruct you, gentlemen, that a waiver or matter of estoppel, to be effectual, must be made by an officer or agent of the defendant authorized to make it.

If there has been no evidence of any waiver or matter of estoppel of this kind except by a local agent, only employed to solicit applications, there must be additional proof of specific authority given him, or the company will not be bound. Unless Mr. Wright had authority to thus represent to this party, and to prevent him from knowing the answers that were given, and to induce him to sign in ignorance of the answers, even if he did it, it is not binding upon the company, and it is not estopped by that act.*

Had Wright such authority? The testimony, and the only testimony on the point is, that he was authorized and employed by Mr. Garniss, the defendant's agent for California, only to solicit applications. He testifies that he, Wright, was instructed to procure answers to those questions; that he was directed to read them over and obtain the answers to those questions; that he never had any instructions to fill up other than with such answers as were given by the applicant. Mr. Wright testifies further, that he never did fill up applications with any other than such answers; and Mr. Garniss also testifies to the same thing—that he gave instructions simply to fill up the applications as indicated by the printed forms, and gave no instructions or authority to fill in any answers except such as were given by the party; and that he never knew of any applications filled up in any other way. There is no testimony, direct or inferential, that goes beyond this, unless it is to be inferred by rule of law, that his powers resulted from the very fact that he was authorized and empowered to solicit these applications from parties desiring to be insured.

There is further testimony to the contrary; because the very application itself, upon its face, indicates that the solicitor had no such authority. I instruct you, gentlemen, from that fact alone, that there is no presumption of law arising that he has authority to do the act which it is claimed he did in this instance. To do that, unless he had express authority beyond the mere right to solicit, would be assuming or presuming that he had authority to perpetrate a gross and palpable fraud upon his employer and in the interest of the assured. No such presumption of law arises from the facts in this case, and there is no direct testimony to show that his authority extended beyond the point I have mentioned.

As I was about to say, the very application with which Wright was furnished—the blanks to be used—indicates his duties and his authority, with its limitations, what he was to do and all he was to do. There are the questions, printed in form, to be answered by the applicant, and to be answered by the party on whose behalf

* See Ryan v. World Mut. L. Ins. Co., 4 Ins. L. Jour. 37; 4 Big. Cas. 627; Goddard v. Mon. F. Ins. Co., 108 Mass. 56; Lewis v. Phœnix L. Ins. Co., 39 Conn. 100.

the insurance is made—not by the solicitor—and on that very blank application are these questions:

"Have you read the answers given to the questions page 1 and 2 of this application, and do you believe them to be correct?"

"Are you aware that any untrue or fraudulent answers to the queries contained in this application, or any suppression of facts in regard to his (or her) health, habits or circumstances, or neglect to pay the premium on or before the day it becomes due, will vitiate the policy and forfeit all payments thereon, except as specified and agreed in the company's policy?"

"Do you understand that agents of the company are authorized to receive payments when due, upon the receipt of an authorized officer of the company, but not to make, alter or discharge contracts, or waive forfeitures?"

Now, if Wright was authorized to make these declarations testified to by Mrs. Lee, and to procure or himself insert and return false answers, that would be an authority to change, by way of estoppel—to waive—the terms of the contract which the defendant itself had prescribed, and that very thing is expressly forbidden in the application which is presented, and under which he is at the very moment acting.

But, gentlemen, the rights of the party are not ended or concluded with the making out of the application. When the application is made out and forwarded to the company it is not yet a contract of insurance. It is only then that it has attained to the position of a proposal on one side, not accepted by the other. There is no contract of insurance until the policy itself is delivered and accepted. If such a representation were made by the solicitor at the time, afterwards, when this contract was delivered, the contract (under which the plaintiff claims, and which she has in her possession ever since) informs the party that the agent had no authority to make any such statement or procure the application in any such manner. It expressly brings it to the attention of the applicant that the contract is made upon the consideration that the representations made in the application for the same are made a part of the contract; and it further provides, as I have already read, that "it is also understood and agreed by the within assured to be the true intent and meaning hereof, that if the representations made in the application for this policy, and upon the faith of which this policy is issued, shall be found in any respect untrue, then and in such case this policy shall be null and void."

When this contract is tendered to him, there is brought to the applicant's attention directly from the defendant itself, from the officers of the company, in the very contract, the statement in express terms, that if those answers are false the contract is void, and it calls his attention to that fact, which would negative any idea o authority to the solicitor to make these representations in fraud of the rights of the company.

Again it says, in the margin: "The agents of the company are authorized to receive premiums, when due, upon receipt of an authorized officer of the company, but not to make, alter, or discharge contracts, or waive forfeitures."

Thus in every paper where the defendant itself acts, it takes particular pains to bring this limitation of authority to the notice of parties dealing with it, and when this policy was delivered, if the party insured was unwilling to accept those terms, he should have rejected it; and it was not a contract until it was delivered, and until he received and accepted it, and the policy itself brought again to his attention the fact that there was no such authority to waive, expressly or by matter of estoppel, any right under the provisions of the policy in question.

This duplicate receipt in evidence, if it be the receipt that was given by Wright on the payment of the first $20 (and whether it is or not is a question for you to determine), also carries out that idea, that the contract is not a contract until accepted by the defendants. One of the provisions of it is: "If declined, the above amount will be returned on the surrender of this receipt; if the policy be not accepted by the party when issued, the above sum shall be forfeited to the company."

It goes upon the theory that Lee might decline to take the policy, although he made the proposition, and then provides that since he has made the proposition and put the company to the trouble and expense of examination, the sum shall be, if he then rejects the policy, forfeited to the company. But whether they acted upon that idea or not, that is the correct legal position of the parties.

In all this evidence there is no evidence that this agent had specific authority to commit this fraud upon the company. All the affirmative evidence in the case goes to show that he had no such authority.

I instruct you, therefore, that there is no evidence which will justify you, in this case, in finding that Mr. Wright had authority from this defendant to perform these acts which they claim to be matter of estoppel. If you were to find against this view from the testimony in this case, I should be compelled to set aside the verdict. I instruct you that there is no evidence tending to show that specific authority; the evidence is all the other way, and there is no conflict in it whatever; and the authority does not result, as a presumption of law, from the mere fact that Wright was furnished with those blank applications, and with authority to fill or have them filled up with the answers given by the parties desiring to be insured as the applications indicate. Then, gentlemen, this policy as it is written, is the contract by which these parties must be bound and their rights determined.

I will say further, with reference to this point, that if Mr. Wright performed the acts which it is claimed he did perform, and in the way stated by Mrs. Lee, it was a fraud upon the defendant, a fraud practiced in the interest, necessarily, of the applicant or the assured, and not in the interest of the defendant, for it is not in the interest of the insurance company to insure an uninsurable life; if the company can not protect itself by its contracts and other means adopted, it will be at the mercy of any of the multitude of persons it necessarily employs, who choose to practice these frauds upon it.

Besides, this kind of fraud could not be well practiced upon the insurance company except by either the co-operation of the applicant—and in case of such action and co operation, of course the policy would be void for fraud on his part—or else through his becoming by gross negligence the passive and culpable instrument of the party perpetrating the act. He is in fault because it is a piece of gross negligence on his part to sign a document of that kind without knowing its contents, and to accept a policy containing these specific provisions, referring back to the application, without considering the effect it would have upon his rights. And such negligence necessarily contributes to the accomplishment of the fraud.

I instruct you, gentlemen of the jury, that this contract is the measure of the rights of these parties; that this clause is binding, and that if there are any false statements or misrepresentation in in any of those answers—any statement substantially false, material to the risk assumed—then you must find for the defendant. If they were all true—substantially true—then you must find for the plaintiff. This brings us to the question whether there was anything false in these representations.

It is claimed on the part of the defendant that these are false in several particulars. One question is, "Have you had any of the following diseases"—among others, "spitting of blood," "rheumatism," "palpitation of the heart," "or disease of any vital part?" The answer is, "No." "Are you subject to cough or shortness of breath?" The answer is, "No." "Have you ever had any serious illness or personal injury?" The answer is, "Broken leg when about 13 years old."

You have heard the testimony on this subject.

* * * * * * * * *

Gentlemen: In addition to your general verdict, I have conclud-

ed to submit to you four interrogations, upon which you are directed to find specially, and my further remarks will have reference to these special findings. I will read them now.

Question—Did Mr. Wright, the defendant's solicitor of applications, write the answers in the application, in accordance with the answers to the questions therein propounded, and information given to him for that purpose by Andrew Lee?

Question—Did Mr. Wright induce Andrew Lee, while ignorant of the contents, to sign the application, by saying that it was only a form to make known his desire to insure, and did he so sign.

Question—Did Andrew Lee, at the time he signed the application, or at any time before the delivery and acceptance of the policy, know what answers were inserted in the application to the questions therein propounded? If not, did he have an opportunity to know?

Question—Did Andrew Lee take the application with him to Vallejo, and return it or cause it to be returned by mail, express or otherwise, to the defendant's office at San Francisco, with the certificate purporting to be made by Dr. McPhee appended.

Gentlemen: These are all questions of fact, and on these questions there is a conflict of testimony; it is for you to determine from that testimony which is right and which is wrong.

I will call your attention, as I deem it my duty to do, to some of the salient points of that testimony, and explain to you what the tendency is, and leave it to you to say what it proves, as it is your province alone to determine the weight to be given to it, and the facts it establishes.

* * * * * * * * * * * *

If there are any contradictions between the testimony given by any of these witnesses on former trials—substantial differences—and the testimony on this trial, you are entitled to consider that also. I mean by "substantial differences," differences in the main important facts of the case. They may differ in the form of the statement; they may differ in recollection as to the precise time and the precise minute, circumstances on different trials, but upon the great and essential facts in issue, can they differ without throwing suspicion upon the testimony?

If you find any differences other than mere formal ones, differences in their testimony upon the main essential facts, that is for you to consider in determining the credibility to be given to the respective witnesses; and if you find any one witness who has wilfully, knowingly testified to a falsehood in any one particular, you are justfied in rejecting his testimony in all other particulars.

Then as to the manner of the witnesses on the stand—their relation to the subject-matter; all these circumstances, taken in connection with the intrinsic probabilities of the case as developed by the evidence, are matters for you to consider in determining which is right and which is wrong; and what, if any, weight shall be given to any of the circumstances. It is my duty to point out the salient points of the testimony and call your attention to them, so that you may reflect upon them in a proper manner, and then leave you to determine the facts upon the testimony. You will answer these specific interrogatories by determining which of these parts is correct on these various points.

To recapitulate: If you find that there is a substantial falsehood in the answers to these questions, in the application which I have mentioned, in a matter material to the risk, you must find a general verdict for the defendant. If you find these are all substantially true, then you must find for the plaintiff. The other questions you must answer according as the testimony satisfies your minds.

On the question of what took place on the making out of this application, I will say to you further, gentlemen of the jury, that the application itself appears to be signed by Mr. Lee and Mr. Moore, and, of itself, that is *prima facie* indication and evidence that those answers are their answers, and that if the other side rely upon overthrowing that, the burden is upon them to prove the issue affirmatively, by testimony satisfactory to your minds, and you are to be governed by the preponderance of evidence. When I say "preponderance of evidence," I do not mean preponderance in amount; I mean its weight taken in connection with the intrinsic probabilities, the natural course of things under the circumstances. There may be half a dozen witnesses upon one side and one upon the other, and yet there might be cases where the jury would be justified in disregarding, under the circumstances, the testimony of all but the one. Whether they should or not is a question for them to determine. You will be governed not by the quantity, but by the quality and weight of the evidence in considering the credibility to be given the various witnesses, and the probabilities in connection with all the circumstances. I will only add, gentlemen of the jury, that if you find for the plaintiff, your verdict will be for the sum of $5,000, with interest at 7 per cent. from September 26, 1870.

General verdict for defendant. The jury disagreed on all the special issues, except that upon the third they found that Lee *had an opportunity* to know the contents of the application.

Correspondence.

SPALDING'S TREATISE.*

EDITOR CENTRAL LAW JOURNAL:—Appended below is the modest rubric of Spalding's Treatise. In the compass of 768 pages is embraced a cyclopedia of law—learning for judges, justices, sheriffs, constables, lawyers, bankers, brokers, business men, "and the rest of mankind." It is a platitude of eulogy that great geniuses are never replaced. Guizot tells us that great men are the mysteries of Providence. It is therefore with no common expectation that we hail this new light—this transcendent genius who has recently burst with metoric glare upon the forensic world. His profound rendition, his extensive research, his *viginti annorum lucubrationes*, his thirty-three thousand citations, his felicity of expression and original use of the mother tongue, preoccupy the inquisitive mind in his favor. This treatise, comprehending such a "mass of accumulation, variety and citation" (as the author ingeniously informs us in his preface), is it to be wondered that we eagerly subscribed in advance for this *multum in parvo*?

The author in his preface tells us that in this treatise he "proceeds upon the principle (which is not recognized by the courts) that men are ignorant of the law, and therefore explains every proposition, no matter how simple or generally understood; *nothing is taken for granted*." Thus this work, in the language of Burke, circumnavigates charity. Here we have science without technical difficulty, learning without obscurity, comprehensiveness without prolixity, perspecuity without circumlocution, wisdom without study—the recondite doctrines of the law, by one master-stroke of this genius, stripped of its superfluous encumbrances and condensed into a few hundred pages. And the key to this philosophical analysis and luminous classification, whereby all is made clear and simple, is found in the ingenious and original method of arranging and treating the various subjects in the alphabetical order. Thus the whole chaos of criminal and civil law is reduced to the order of an organized science. Such are the triumphs of inductive philosophy, which has achieved its last grand triumph in its application to the law!

"Nothing is taken for granted." We beg to differ. Deferentially and with bated breath, we crave leave to differ. For example, it is usually taken for granted that no man of honor will committ wholesale plagiarism. A member of the legal guild, pluming his ambitious pinions and soaring o'er Parnassus, surely would not have the effrontery to essay such a flight in borrowed plumage. It is a custom time-honored among authors when they appropriate large passages *verbatim et literatim* from other authors, to first obtain their permission, or at least to render the poor tribute of an acknowledgement of the indebtedness. Not so with our author. *Nothing is taken for granted*—not even the fact that the monstrous fraud which he has perpetrated upon the profession in Indiana would suffer detection. Here is a sample which can be multiplied by the score. On page 111, he gives us forms of complaints against common carriers. Any one who has Estee's Pleading and Practice will turn to 2d Estee, pages 122, to 129 inclusive, for forms of complaints against common carriers. Estee's form, No. 389, reads:

The plaintiff complains and alleges:

I. That at the times hereinafter mentioned, the defendant was a common carrier of goods for hire between the places hereinafter named.

II. That on the day of 18 , one A. B. delivered to the defend-

* SPALDING'S TREATISE.—The practice and forms at large in justices' courts for the state of Indiana, and analysis of the law and practice concerning personal property for attorneys at law, justices of the peace, ministerial officers, law students, bankers, brokers and business men, containing over thirty-three thousand citations.

ant certain goods, the property of the plaintiff, to wit (designate the goods), of the value of dollars, and the defendant, as such carrier, received the same, to be by him safely carried to and there delivered to or a reasonable reward to be paid by therefor.

III. That the defendant did not safely carry and deliver said goods; but on the contrary so negligently conducted and so misbehaved in regard to the same, as such carrier, that the same were wholly destroyed and lost to the plaintiff.

Such is Estee's form. Observe the striking resemblance in the order of allegation and phraseology between that and the one given by Spalding, as an additional illustration of the adage, how great minds flow in the same channel. Spalding's form is as follows:

Said Plaintiff alleges:

That at the times hereinafter mentioned, said Defendant was a common carrier of goods for hire between the places hereinafter mentioned.

That on the — day of —— 187 , one A. B. delivered to said Defendant, in good order, certain goods, the property of said Plaintiff, to wit:—(designate the goods) of the value of —— dollars, and said Defendant, as such carrier, received the same to be by him safely carried to ——— for a reasonable compensation, to be paid by ——— therefor.

That said Defendant did not safely carry and deliver said goods, but on the contrary, so negligently conducted in regard to the same, as such carrier, that the same were wholly destroyed and lost to said plaintiff.

Such are the two forms, and no legal mind, though it were trained and acute to "sever a hair 'twixt north and northwest side," but will be impressed with the alterations and improvements made by Spalding. These improvements consist, first, in the use of the capital letter in the words plaintiff and defendant, second, in the substitution of the word *said* in the place of the article *the* before each of the words plaintiff and defendant as they occur in the pleading; third, the use of the dash instead of leaving blank spaces where dates etc. are to be inserted, and lastly, the use of the word compensation in the stead of the word reward. There may be other important corrections made by Spalding to promote certainty and precision in pleading, but they will probably escape the attention of all but him who takes nothing for granted.

All of the forms given in this treatise, of complaints against common carriers, have been incorporated bodily from Estee, excepting, of course, those amendments which occur to the astute judicial intellect that labored so painfully in bringing forth this work. So also are all his forms of complaints in actions on bills of exchange, taken from 2d Estee on Pleadings, beginning on page 554 with form 200, *et seq.* And did time permit we could doubtless trace all of his forms to the same prolific source.

Not much originality can be expected of law-writers, perhaps; but it may be safely said that no forms of pleadings can be drawn which are applicable in all the various states. But a treatise that professes to be adapted especially to the practice and pleadings of any particular state, should contain in its forms no surplusage. Conciseness is of the first merit in pleadings—especially where the pleadings are advertised as models. No such treatise can be made up out of other works on similar subjects prepared for other states And the author who pretends to give us a large number of forms adapted especially to the Indiana code, but who borrows them from works adapted especially for other states, is an arrant imposter. Not every pretentious, briefless attorney can write a law book, and it ought to be understood, once for all, that when a legal writer foists a "mass of accumulation" upon the profession, and plumes himself as a Kent or a Story, that the proper penalty be visited upon him by the profession. Whoever writes a treatise such as this purports to be, must have a mind trained and learned in the law, and sufficient skill and knowledge and industry to digest and prepare forms of pleadings moulded upon the statutes and decisions of the courts of this state, which are sustained by references to our reports, and are free from inaccuracy and surplusage.

These are the characteristic vices of this work. It is not adapted to the practice before justices of the peace in this state; its citations of Indiana decisions are equally meager and unreliable; its forms of pleadings abound in surplusage. And he has not deigned to do Estee the poor favor of a single reference in the notes, or of an acknowledgement of his large indebtedness to him in the preface or introduction—nothing of the kind. It may be accounted for, however, without doing injustice to our author. You will remember, Mr. Editor, that when some of Alexander Dumas' envious critics reproached him for plagiarizing, *in extenso*, and with unblushing audacity, from Sir Walter Scott's novels, Dumas did not condescend to deny it, but proudly retorted, "Great minds like myself and Shakspeare do not plagiarize, *we conquer.*"

This treatise purports to be adapted especially to practice before justices. If it were not utterly worthless for this purpose, we might condone the monstrous imposition, on condition that he never write another book on Indiana practice. Now, of all branches of practice before a justice of the peace in our state, there is none upon which there has been such a multitude of decisions, and upon which light is so much needed by the justice and young practitioner, as in actions against railroads, for injuries to animals. It is not difficult to older lawyers, but it is in some respects rather technical, that is to say, from a non-professional stand point, as is abundantly attested by the numerous appeals and decisions, turning upon specific allegations in the complaint and service of process. Spalding deals with the subject in a manner wholly incomprehensible in one who takes nothing for granted. He sets out the statute barely—no decision, no sage exposition of the statute, of the rules of practice, of the time and mode of service. Yet all this ought to be easily dispensed with, perhaps, when we consider the rich stores of knowledge fetched up from the depths of legal lore, in his exposition of the following caption given on p. 766:

WEEK.

"A week is seven days of time * * * The first day of the week is called Sunday; the second, Monday; the third, Tuesday; the fourth, Wednesday; the fifth, Thursday; the sixth, Friday; the seventh, Saturday. And this rare *morceau* of legal erudition is shown by citation to be from the 1st Ind., p. 121, which report we find, by reference, has nothing in it containing the remotest allusion to week. The author has obviously drawn on his almanac for his law, and on his imagination for the "mass of accumulation, variety and citation."

On page 57, in his observation on the institution of a suit by an executor or administrator, our author says that the complaint should allege the death of the testator, his leaving a last will and testament, the appointment of the plaintiff as executor, the probate of the will, the issuance of letters testamentary to plaintiff, and his qualification and entry upon the discharge of his duties as executor; and that as to the administrator, the date, place and power of appointment of the administrator, must be averred issuably, and if this is not done the complaint is bad; and the rule of practice so confidently laid down for Indiana, is sustained by reference made to New York reports, although it is held by our supreme court, that when the plaintiff styles himself executor (or administrator), etc., and so refers to himself in the body of the complaint, neither the death of the decedent, nor the appointment of the executor (or administrator) need be alleged; that where one sues simply as administrator or executor, the issue of his representative capacity can only be raised by special verified plea on the part of the defendant.

We should expect in a cyclopædia of legal learning, condensed in so narrow compass, the utmost conciseness, yet our author gives us as a form of complaint in these actions, a model of surplusage. And in all his remarks and references on the institution of suits, by and against executors and administrators, with all his profuse references and 33,000 citations, there is not a single reference to our reports. Yet our supreme court has copiously expounded the statute, and laid down the rules of practice relative to this class of actions.

In the discussion of the rights of the surety against the principal, our author says, on page 742, that payment of a note by a surety by giving a new note, is sufficient payment, even if the new note has not been paid when the suit is commenced by the surety against the principal; and to sustain this rule of law for Indiana, makes reference to the Massachusetts, Maryland and New Hampshire reports, happily and blissfully ignoring the decisions of our own court, holding that a surety by delivering his own note to the holder of the note of his principal, and receiving the latter note, does not thereby make such payment or satisfaction as to enable him to sue his principal for money paid; and that he can not sue his principal for money paid, until he has paid his own note so held, unless it appear that the holder of the note of the principal agreed to receive the note of the surety in payment or discharge of the original note.

In view of this decision, into what a dilemna would the business man in our state be likely to find himself, who should rely upon the rule as laid down by Spalding? And in all of our author's discussion of suretyship, covering some thirteen pages, freighted with knowledge for the Indiana business man and lawyer, there is not a single reference to Indiana authority, nor does he even allude to the statute, or the method provided thereby, by which the surety may compel the creditor to proceed against his principal, and the creditor failing to do which, the surety is discharged.

We have alluded to the novel and luminous arrangement of the work. Thus, under the head of "Actions," the civil and criminal practice is blended and exhausted. Then after Actions, we have Adjournment, Admissions, Adolescence, Attorneys, Auctions, Authority, *Averdupois* (avoir), Barrister, Bastardy, Behavoir, Confession, Concealment, Conflict of Laws, Mistakes, Mitigation, Moieties, Notice, Novation, Numbers. And as an other indication of the reach and scope of this author, who, like Cicero and Burke, takes all knowledge for his department, by whom nothing is taken for granted, among other expositions of the recondite doctrines of the law, he devotes valuable space to the discussion of Numbers, and informs us that a number is a collection of units. So fixed is the habit of borrowing and imitation, that he not only imi-

tates Estee, but also that great naturalist, who, in writing a natural history of Norway, devoted one chapter to rats. "There are no rats in Norway." Such were the contents of the chapter. And thus our author groups together Conflict of Laws and Numbers, Corporations and Months, Contracts, Crimes, Torts, Adolescence, Weeks, Weights and Measures—all, all things, receive his homage,—"the very least as feeling his care, and the greatest as not exempted from his power." What less could be expected of an author who takes nothing for granted?

We add in conclusion that we did not intend to dignity this work by so extended a notice. It has been done, however, not because we love the treatise less, but the profession more. But had not the author procured, by God knows what means, a testimonial from the judges of our supreme court, commending it to the bar as a work "invaluable not only for the attorney, officer and law student, but to the commercial public;" and had we not been induced to subscribe for it before having seen it, and been defrauded out of our money, we might have held our peace. Among the multitudinous spawn of the legal press, and in the vast mass of trash under the name of law, palmed off upon the profession, it is high time that our law journals, whose function it is to approve the good, and give warning of the bad, should stigmatize this last great imposition. Of all the bad and worthless law publications which have swarmed forth upon the people during these latter years, Spalding's Treatise, on the Practice before Justices of the Peace in Indiana, is the very worst specimen of the very worst class, all to be had for $7.50, by addressing Wilstach, Baldwin & Co., Nos. 141 and 143 Race St., Cincinnati.

W. L. PENFIELD.

AUBURN, IND.

Recent Reports.

REPORTS OF CASES DECIDED IN THE SUPREME COURT OF APPEALS OF VIRGINIA. By PEACHY R. GRATTAN. Vol. 24. From Nov. 1, 1873, to April 8, 1874. Richmond: R. F. Walker, Superintendent of Public Printing. 1875. pp. 676, and index, pp. 27.

This volume, although of light weight is of peculiarly beautiful appearance, being bound in bleached or light-colored leather, uniform with the other volumes of Grattan; but unlike his earlier volumes, it bears evidence of the prevailing tendency of almost all our state reports towards an unwarrantable spreading out of a little matter over a large space. In the 676 pages of this book there are reported only some 47 cases, 4 of which are decided in a single opinion, thus making really only 43 cases in the book. The third volume of the series, a book of about the same size, has 786 pages, and reports over 60 cases; while the 115th Mass., a book of 603 pages, reports 149 cases, and the 24th Ohio State, containing 680 pages, reports 86 cases. Much of this waste of space is due to the insertion of the term and title of the cases in the side-margin, and to the large type used. The paper and binding are unexceptionable, the latter being the work of Messrs. Randolph & English of Richmond; but the book abounds in typographical and grammatical errors, and broken type, some of which are corrected in a sad collection of errata in the fly leaf. This is due to the careless proof-reading, and almost leads to the suspicion that the experienced and able reporter exercised little supervision over the production of the work beyond the preparation of the matter. The tables of cases reported and cited are full; the former using the word "and" to designate those cases where the names of the defendants in error are placed alphabetically in the list.

From among the few interesting decisions reported, we quote the following:

Agent of Confederate Government—Note given for Supplies to Confederate Army.—Ruckman v. Lightner's Executors, p. 19. Opinion by Moncure, P. A note given by an agent of the late confederate states government, and binding himself for the price of cattle purchased for the support of the armies of said government, and for the purpose of aiding in carrying on the war against the United States, is a valid contract, and may be enforced against the obligor, after the end of the war.

Ancient Dam—Adverse User—Evidence.—Field v. Brown, p. 74 Opinion by Bouldin J. In 1824 G. built a dam across H. river, which was not then injurious to lands above it. In 1845 G. raised his dam, injuring the lands of F., above it. F. sues B. who claims under G., for continuing the dam to the injury of his land, reciting that G. erected the dam without authority of law. *Held*, that F. may prove that the dam was raised in 1845; and that the injury was caused by raising it; also that the use of said dam by G., and those claiming under him, adversely and uninterruptedly as to the plaintiff, and those claiming under him for twenty years, is not conclusive of the defendant's right to continue such user, but is only presumptive, and may be rebutted.

Sale of Real Estate—Consideration in Confederate Money.—Stearns v. Mason, p. 484. Opinion by Anderson, J. Land was sold in 1862; the price fixed with reference to confederate money; deferred payments to be paid in "current money of Virginia." *Held*, that parol evidence was admissible to show that such payment was not to be in confederate notes; and that such being shown, the payments are to be "scaled" as of the value of confederate currency at the time of the contract.

Life Insurance — Payment of Premiums During the War.—Mutual Benefit Life Ins. Co. v. Atwood's Admx., p 497. Opinion by Bouldin, J. A. holding a policy of the company named, removed to Virginia in 1850, paying his premiums thereafter regularly to the company's agent in Virginia, to December, 1861, when, a premium falling due, he offered to pay it to the agent, who declined to receive it, until the company could be heard from, but took A.'s note for it. A. died in November, 1862, and his widow, having qualified as administratrix, brought suit to recover the amount of the policy. *Held*, that the company is bound to pay the amount of the policy, less the last unpaid premium. The policy having been in favor of a former wife who had died, *held*, that A. having paid the premiums for thirteen years thereafter, his administratrix was entitled to the insurance as a part of his estate. The non-payment of premiums during the war did not vacate the policy. Such contracts were not abrogated, but merely suspended by the war. The same, substantially, was decided by the case of N. Y. Life Ins. Co. v. Hendren, p. 536. See upon this question 1 CENT. L. J. 76, 575.

C. A. C.

Legal News and Notes.

—THE Chicago Legal News says that Miss Hulett, of the Chicago bar, is succeeding well in her practice. She appears before Judge Blodgett, of the United States District Court, in a bankruptcy case, in the circuit court in a coms mon law case before a jury, in the probate court in a contested will case, or before the chancellor in a divorce case, with the same easy manner and confidence that she would before a justice of the peace, and with an ability much above the average lawyer. In debate she is able, ready, and never taken by surprise.

—THE NEW TWEED SUIT.—Directly after the institution of the last suit against William M. Tweed, to recover the $6,000,000, out of which sum, it is claimed he has defrauded the city of New York, a motion was made on his behalf for a bill of particulars, the idea being to compel an itemizing of the entire account. It was claimed, on the part of the people, that this would be next to an impossibility. Judge Donohue, however, before whom the motion was made, thinks that such a bill of particulars not only can be furnished but should be furnished. Mr. O'Conor, of counsel for the people, is understood as stating that the order of Judge Donohue amounts virtually to a defeat of the suit.

—THE grounds on which Mr. Michel bases his suit by mandamus, against the New York postmaster to compel him to carry a book at the old rate, are that article 1, section 1, of the Constitution, which provides that "all bills for raising revenue shall originate in the house of representatives, but the senate may propose or concur with amendments as on other bills;" he alleges that the appropriation bill, originating in the house, was not a revenue bill, but that the senate, by adding an amendment providing for raising revenue, did originate the bill so far as it relates to revenue in violation of the clause abovquoted. The house, by this argument, could have added the amendment constitutionally, because it can originate revenue bills; but the senate could not do so, because it can not originate revenue bills.

—CARL VOGT.—The Independence Belge announces that the United States government has presented a claim to the Belgian government for the sum of 31,000 francs, for expenses incurred by the arrest and long detention of Joseph Stupp, alias Carl Vogt, the alleged murderer of the Chevalier de Blanco, in Brussels. An appropriation has been made, it is stated, by the Belgian government, and a deposit of the amount claimed has been made to liquidate this claim of the United States government. Carl Vogt is shortly to be tried before the Court of the Assizes of Brabant. He has already had, jointly with his former mistress, Catherine Weyerstrass, an examination before a judge of instruction, where the American detective Farley, by whom Vogt was taken back to Belgium, was also examined as a witness through an interpreter from the American Legation in Brussels. Detective Farley has left Belgium to return to this country, but he will appear again at the trial if his presence should be found necessary. The complications and delay this case has caused and the enormous expenses, which will amount to no less than 1,000,000 francs, renders this case of Vogt one of the *causes celebres*.—[*N. Y. Herald*.